

Police Body Cameras: Historical Context, Ongoing Debate, & Where To Go From Here

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## **Dedication**

*Dedicated to those who protect us, to those who strive for a better world, and to amazing family and friends.*

## **Abstract**

Calls for greater use of police body worn cameras (BWCs) gained widespread support after several unarmed black men were killed by law enforcement between 2014 and 2017. However, BWCs are being asked to solve problems far more complex than they appear on the surface. This paper begins by establishing the historical roots of distrust between the black community and police. Next, the paper proposes a theoretical framework and examines key issues, including (1) ideals of BWCs as an instrument of the search for truth and a means of greater police accountability, (2) potential limitations, including questions of reliability/accuracy, privacy, and costs, and (3) questions over access to footage. Finally, this paper uses recommendations by the American Civil Liberties Union and Minneapolis Police Conduct Oversight Commission to argue that although BWCs are not a panacea, they can still be part of the solution for the concerns they are meant to address.

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## **Police Body Cameras: Historical Context, Ongoing Debate, & Where To Go From Here**

### *Chapter 1: Introduction*

On the night of October 20, 2014, a 17-year-old black teenager jogs down the center of a four-lane Chicago street, illuminated by streetlights and the blue and red police lights around him.<sup>1</sup> As two officers approach him, he begins walking diagonally across the road.<sup>2</sup> As he reaches the right lane, an officer opens fire, with the teen instantly falling to the ground.<sup>3</sup> Three puffs of smoke can be seen rising from the ground near the teen's body.<sup>4</sup> Laquan McDonald died that night of 16 gunshot wounds.<sup>5</sup>

These details were revealed by dash camera footage released by the city on November 24, 2015, the same day state prosecutors charged the police officer, Jason Van Dyke, with first-degree murder.<sup>6</sup> On December 16, Van Dyke was indicted by a grand jury for six counts of first-degree murder.<sup>7</sup> Although the dash camera footage provided valuable evidence for prosecutors, this instance represents one example of a high profile shooting that led to calls for greater accountability of police officers, including through police body cameras, also referred to as body-worn cameras (BWCs).<sup>8</sup>

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<sup>1</sup> "Dash-Cam Video Released Showing Laquan McDonald's Fatal Shooting," *NBC 5 Chicago*, Nov. 24, 2015, <http://www.nbcchicago.com/news/local/Police-Release-Disturbing-Video-of-Officer-Fatally-Shooting-Chicago-Teen-352231921.html>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Nausheen Husain, "Data: Laquan McDonald timeline: The shooting, the video and the fallout," *Chicago Tribune*, Nov. 24, 2015, <http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html>.

<sup>7</sup> *Ibid.*

<sup>8</sup> Kami Chavis Simmons, "Body-mounted Police Cameras: A Primer on Police Accountability vs. Privacy," *Howard Law Journal* 58 (2014-2015): 882-883, <http://heinonline.org/HOL/Page?public=false&handle=hein.journals/howlj58&page=881&collection=journals>; "Considering Police Body Cameras," in "Developments in the Law: Policing," *Harvard Law Review* 128, (2014-2015): 1794, <http://heinonline.org/HOL/Page?public=false&handle=hein.journals/hlr128&page=1794&collection=journals>.

In the months following the shooting of McDonald, Chicago police significantly expanded their use of BWCs in an attempt to begin regaining the public's trust, citing the shooting of McDonald as a contributing factor of implementing more BWCs.<sup>9</sup> On November 29, 2015, Chicago officials, including Mayor Rahm Emanuel, announced the decision to expand the use of BWCs to six more police districts by June the following year, using a \$1.1 million grant from the U.S. Department of Justice.<sup>10</sup>

On July 29, 2016, eight months after the shooting of Laquan McDonald and less than two months after BWCs were implemented in several police districts, another shooting of a black man by law enforcement occurred in Chicago, the first reported instance in which police officers were wearing BWCs.<sup>11</sup> The incident would demonstrate both the potential benefits as well as the possible limitations of body cameras.

The series of events began at about 7:30 p.m. with several officers attempting to stop a Jaguar convertible, driven by Paul O'Neal, an 18-year-old black man trying to flee police after reportedly stealing the vehicle.<sup>12</sup> BWCs captured two officers opening fire on the car, violating department procedures and policies.<sup>13</sup> However, when one officer shot O'Neal behind a house after a foot chase, the BWC worn by the officer was not operating, meaning the fatal shot went unrecorded.<sup>14</sup> The camera did pick up a conversation after the shooting, however, in which the officer said to a supervisor "When I approached ... I didn't know if he was armed or not."<sup>15</sup>

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<sup>9</sup> Annie Sweeney and Toddy Lighty, "Body cams give close-up, disturbing view of fatal police shooting," *Chicago Tribune*, Aug. 12, 2016, <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-shooting-body-camera-met-20160805-story.html>.

<sup>10</sup> Polly Mosendz, "In Wake of Laquan McDonald Charges, Chicago Expands Body Camera Program for Officers," *Newsweek*, Nov. 30, 2015, <http://www.newsweek.com/wake-laquan-mcdonald-charges-chicago-expands-body-camera-program-officers-399730>.

<sup>11</sup> Sweeney and Lighty, "Body cams give close-up, disturbing view of fatal police shooting."

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

As result, this sequence of events shows both the potential and the limitations of the cameras.<sup>16</sup> On one hand, BWCs recorded the officers shooting at a speeding car against department policy and conversations after the fatal shooting, helping determine what happened and holding officers accountable.<sup>17</sup> On the other hand, the BWC worn by the officer who fired the fatal shot did not record the most pivotal moment, either because of a technological problem or the officer turned it off.<sup>18</sup> These events suggest that BWCs are not a panacea, but can still be beneficial if utilized properly.

The calls for BWCs first gained national attention in light of the August 2014 police shooting of Michael Brown, an unarmed black teenager in Ferguson, Missouri, and the subsequent decision by a grand jury not to indict police officer Darren Wilson.<sup>19</sup> The calls got even louder a week later when a Staten Island grand jury did not indict New York Police Department Officer Daniel Pantaleo, who used a chokehold on Eric Garner, killing the unarmed black man.<sup>20</sup> One proposed solution to help ease tensions and deter future incidents is the implementation of BWCs as a means of documenting interactions between the public and law enforcement and thus bringing greater police accountability.

However, it is not that simple. The high-profile deaths of unarmed black men by law enforcement from 2014 to 2017 are not the first instances of division and distrust between the black community and police. It is a conflict woven into the fabric of the nation's history. With its origins of slavery, black individuals' distrust of law enforcement authorities has evolved and transformed over several generations, but has never been fully addressed or resolved. Thus, this paper begins by providing this

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<sup>16</sup> Ibid.

<sup>17</sup> Ray Sanchez, "Police shootings highlight concerns about body cameras," *CNN*, Aug. 4, 2016, <http://www.cnn.com/2016/08/03/us/police-body-cams/>.

<sup>18</sup> Ibid.

<sup>19</sup> "Considering Police Body Cameras," 1794-1795; Sanchez, "Police shootings highlight concerns about body cameras."

<sup>20</sup> Simmons, "Body-mounted Police Cameras," 882; "Considering Police Body Cameras," 1794-1795.

historical context, tracing back to the Thirteenth Amendment, the forced labor system known as “peonage,” and white Americans’ growing fear of black criminality, manifesting in lynching, mass incarceration, and police brutality. In so doing, this paper suggests that BWCs are meant to be a solution to a problem that is far more complex than it appears on the surface – one that goes beyond the recent cases of unarmed black men who died at the hands of law enforcement.

Second, this paper proposes a theoretical framework that necessitates balancing the goals of BWCs with potential limitations or harms. Consequently, this paper discusses (1) the ideals and perceived benefits of the cameras, including as an instrument of the search for truth and as a means of greater police accountability, (2) the potential limitations, concerns, and harms of BWCs, including questions of reliability and accuracy, privacy, and costs, and (3) the questions of who should have access to footage recorded by BWCs, providing a case study of Minnesota SF 498. In so doing, this paper argues that not only is the historical context more difficult and complicated than it appears on the surface, but so too is the current BWC debate and the technology itself.

Finally, this paper aims to provide and justify recommendations by the American Civil Liberties Union (ACLU) and the Minneapolis Police Conduct Oversight Commission (PCOC) on how to address the concerns associated with BWCs while still maintaining the goals of truth and accountability. As a result, this paper provides lawmakers and law enforcement officials with tangible, practical means of determining proper policies that can be beneficial to all stakeholders. Further, this paper argues that although BWCs are not a perfect solution for the concerns that have led to their use, they can still be part of the solution with strong laws and policies in place balancing the ideals and perceived benefits of the cameras with their limitations or harms.

## Definitions

The Police Executive Research Forum (PERF) is a non-profit police policy and research organization partially funded by the U.S. Department of Justice (DOJ) Office of Community Oriented Policing Services. The organization defines police body cameras as “small video cameras – typically attached to an officer’s clothing, helmet, or sunglasses – that can capture, from an officer’s point of view, video and audio recordings of activities, including traffic stops, arrests, searches, interrogations, and critical incidents such as officer-involved shootings.”<sup>21</sup> The American Constitution Society for Law and Policy, a Washington D.C. organization focusing on the individual rights and liberties granted by the U.S. Constitution, defines a BWC as “a small camera that is clipped to a police officer’s uniform, on his chest or possibly to head-gear, such as glasses or a head-mount. It can then record video of the area in front of it and audio of the surrounding environment. The camera is either activated by the officer wearing it or automatically triggered by a sound, movement, or other stimulus.”<sup>22</sup> The American Civil Liberties Union (ACLU) defines BWCs as “small, pager-sized cameras that clip on to an officer's uniform or are worn as a headset, and record audio and video of the officer's interactions with the public.”<sup>23</sup> The combination of these definitions suggest that BWCs are (1) small cameras (2) worn on the body of an officer (3) that take video of the surrounding area from a police officer’s point of view and (4) that must be activated in some way to begin recording.

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<sup>21</sup> Lindsay Miller, Jessica Toliver, and Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned* (Washington D.C: Office of Community Oriented Policing Services, 2014), 1, <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

<sup>22</sup> Marc Jonathan Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” *American Constitution Society for Law and Policy*, (2015): 3, [https://www.acslaw.org/sites/default/files/Blitz\\_-\\_On-Body\\_Cameras\\_-\\_Issue\\_Brief.pdf](https://www.acslaw.org/sites/default/files/Blitz_-_On-Body_Cameras_-_Issue_Brief.pdf).

<sup>23</sup> Jay Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” *American Civil Liberties Union*, March 2015, 1, <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>.

## Nationwide Use

Since 2013, different organizations have estimated how many police departments were using BWCs across the United States. The National Institute of Justice (NIJ), the research, development, and evaluation agency of the DOJ, and PERF found in a 2013 survey, prior to the shooting of Michael Brown, that over 75 percent of police departments in the sample did not use BWCs.<sup>24</sup> Of the 63 departments that did, nearly one-third did not have a written policy on their use.<sup>25</sup> Citing the 2013 Law Enforcement Management and Administrative Statistics (LEMAS) study, an agency that annually collects data from over 3,000 state and local law enforcement agencies under the Justice Systems Improvement Act (1979), the Bureau of Justice Statistics found that 32 percent of local police departments used BWCs in 2013, a finding similar to PERF.<sup>26</sup> In 2014, Vocativ asked police departments in the 100 most populous U.S cities whether they used BWCs or not, with 41 reporting they used them on some officers and 25 saying they had plans to implement them.<sup>27</sup> 30 cities did not have any plans to use body cameras and four did not respond.<sup>28</sup> The Major Cities Chiefs Association and Major County Sheriffs' Association are two professional associations of the chiefs and in the largest cities and counties in the United States, who often serve in advisory roles to the DOJ, Department of Homeland Security, and the Department of Defense.<sup>29</sup> In January 2016, the organizations published a survey in which they asked 70 law enforcement agencies

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<sup>24</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 2; “Research on Body-Worn Cameras and Law Enforcement,” *National Institute of Justice*, Jan. 3, 2017, <https://www.nij.gov/topics/law-enforcement/technology/pages/body-worn-cameras.aspx>.

<sup>25</sup> Ibid.

<sup>26</sup> Brian A. Reaves, “Local Police Departments, 2013: Equipment and Technology,” *U.S Department of Justice Bureau of Justice Statistics*, July 2015, <https://www.bjs.gov/content/pub/pdf/lpd13et.pdf>.

<sup>27</sup> Abigail Tracy, EJ Fox, and Ryan Walsh, “Is Your Police Force Wearing Body Cameras,” *Vocative*, Nov. 15, 2014, <http://www.vocativ.com/usa/justice-usa/police-force-wearing-body-cameras/>.

<sup>28</sup> Ibid.

<sup>29</sup> “About Major Cities Chiefs Association,” *Major Cities Chiefs Association*, accessed April 24, 2017, <https://www.majorcitieschiefs.com/about.php>; “About Us,” *Major County Sheriffs of America*, accessed April 24, 2017, <http://www.mcsheriffs.com/about.php>.

around the country in 2015 about their plans for implementing BWCs.<sup>30</sup> 95 percent reported either implementing BWCs or committing to using them, with only five percent saying they did not intend to implement BWCs or complete a pilot program.<sup>31</sup> However, only 19 percent of the agencies reported they were “fully operational.”<sup>32</sup> The other 77 percent either “intend to implement,” were in the piloting phase, or have completed the pilot but had not yet started a program.<sup>33</sup> Nevertheless, these studies suggest a general trend of increased use of BWCs across the United States.

### **Federal Action**

Part of the increase may be related to action taken by President Barack Obama’s Administration and by Congress, starting in 2014. Citing the events in Ferguson, Missouri and across the country, President Obama proposed a three-year \$263 million investment package on December 1, 2014 that would increase use of BWCs, expand training for law enforcement agencies (LEAs), add more resources for police department reform, and multiply the number of cities where the DOJ facilitates community and local LEA engagement.<sup>34</sup> The creation of a Body Worn Camera Partnership Program would provide a 50 percent match to states or localities that purchased BWCs and storage for the footage.<sup>35</sup> The White House estimated that the investment would help purchase 50,000 body worn cameras.<sup>36</sup> In May 2015, the DOJ announced it would provide \$20 million to police departments for BWCs, the first installment in a three-year program

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<sup>30</sup> “Major Cities Chiefs and Major County Sheriffs Technology Needs – Body Worn Cameras,” *Major Cities Chiefs and Major County Sheriffs*, December 2015, ii, <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvnT.EAJQwK4/v0>.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> “Fact Sheet: Strengthening Community Policing,” *The White House Office of the Press Secretary*, Dec. 1, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/12/01/fact-sheet-strengthening-community-policing>.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

budgeted at \$75 million.<sup>37</sup> \$17 million would be for purchasing the BWCs, \$2 million for training and technical assistance, and \$1 million to develop tools aimed to evaluate best practices of BWC implementation.<sup>38</sup> On June 10, 2015, Congress passed a resolution urging local police departments to use BWCs following the high-profile police shootings across the country.<sup>39</sup> Although the measure was symbolic, it helped reinforce Congress' concerns over both police and civilian safety and also federal support for BWCs.<sup>40</sup>

## Polls

Two polls, one by the *Economist* and YouGov and the other by the *Washington Post* and ABC News, both demonstrate strong public support for BWCs as well. The *Economist*/YouGov poll from April 2015 found that 88 percent of those surveyed supported BWCs, with 8 percent opposing their use.<sup>41</sup> In a March 2016 poll, the *Washington Post* and ABC News found that 86 percent of the 1,000 adults surveyed nationwide supported BWCs, with 13 percent opposing their use.<sup>42</sup> 91 percent of the black men and women surveyed supported the use of the BWCs, the highest percentage of any race or demographic.<sup>43</sup> More broadly, the use of BWCs appears to have

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<sup>37</sup> David Jackson, "Obama team will fund police body camera project," *USA TODAY*, May 1, 2015, <http://www.usatoday.com/story/news/nation/2015/05/01/obama-police-body-cameras-josh-earnest-baltimore/26696517/>; "Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States," *Department of Justice Office of Public Affairs*, Sept. 21, 2015, <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law>.

<sup>38</sup> Ibid.

<sup>39</sup> Veronica Majerol, "Should police wear body cameras? While video can tell us a lot about encounters between the police and the public, body cams also raise concerns about privacy," *New York Times Upfront*, Sept. 7, 2015, <http://go.galegroup.com/ps/i.do?p=PROF&sw=w&u=mnaumtwin&v=2.1&it=r&id=GALE%7CA436695119&asid=f22dca9d9f0013a3c9f2939d3e01e832>; Daniel Newhauser, "The House Just Voted to Back Police Body Cameras," *The Atlantic*, June 10, 2015, <https://www.theatlantic.com/politics/archive/2015/06/the-house-just-voted-to-back-police-body-cameras/451551/>.

<sup>40</sup> Ibid.

<sup>41</sup> Kathy Frankovic, "Unlike Ferguson, the shooting of Walter Scott finds racial agreement," *YouGov*, April 15, 2015, <https://today.yougov.com/news/2015/04/15/unlike-ferguson-shooting-walter-scott-finds-racial/>.

<sup>42</sup> "Cameras help hold police accountable," *USA TODAY*, March 22, 2016, <http://www.usatoday.com/story/opinion/policing/community-calls/2016/03/22/police-accountability-body-cameras/82136808/>.

<sup>43</sup> Ibid.



“overwhelming support from every stakeholder in the controversy – the public, the white house, federal legislators, police officials, police unions, and the American Civil Liberties Union.”<sup>44</sup>

## **ACLU & PCOC Recommendations**

In March 2015, in response to events such as the shooting of Michael Brown and the death of Eric Garner, the ACLU released an updated version of its policy “Police Body-Mounted Cameras: With Right Policies in Place, a Win For All,” written by Jay Stanley, the ACLU’s Senior Policy Analyst.<sup>45</sup> This paper focuses on the ACLU recommendations in particular because the organization has been at the forefront of the debate over BWCs as the cameras have gained national exposure. The ACLU has also updated and adapted their recommendations as issues regarding BWCs have evolved.<sup>46</sup> The Minneapolis PCOC, a commission of the Minneapolis Department of Civil Rights, aims to ensure that “police services are delivered in a lawful and nondiscriminatory manner by shaping police policy, auditing police misconduct cases” and other functions, including “facilitating cultural awareness trainings for the Minneapolis Police Department.”<sup>47</sup> The PCOC published “Body Camera Implementation Research and Study” in September 2015, providing several recommendations related to BWC policies.<sup>48</sup> This paper focuses on this particular organization’s recommendations because of the methodology utilized. For each recommendation, the PCOC surveyed existing national practices and recommendations, determining “best practices” used or suggested

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<sup>44</sup> “Considering Police Body Cameras,” 1795.

<sup>45</sup> Jay Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” *American Civil Liberties Union*, 2015, 1-9, <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>.

<sup>46</sup> Ibid.

<sup>47</sup> “Police Conduct Oversight Commission,” *Department of Civil Rights*, accessed April 14, 2017, <http://www.ci.minneapolis.mn.us/civilrights/conductcomm/index.htm>.

<sup>48</sup> “Body Camera Implementation Research and Study,” *Police Conduct Oversight Commission*, September 2015, 1-34, <http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/wcms1p-148199.pdf>.

by organizations across the nation, including the ACLU, and gathered feedback from the Minneapolis community members based on their perceptions of BWCs.<sup>49</sup> The PCOC then made recommendations, taking both existing policies as well as community feedback into account.<sup>50</sup>

Each publication reached three similar conclusions. First, that the use of BWCs can be valuable or even necessary as a means of achieving greater accountability for law enforcement. Second, both organizations argued that BWCs can be a “win-win” for all parties involved if policies are enacted that address the concerns of reliability/accuracy, privacy, and costs associated with BWCs. Both publications also included ways to balance public access to BWC footage with potential limitations, especially related to privacy. Finally, each organization concluded that strong policies are absolutely necessary to ensure the potential limitations and harms of the cameras can be minimized while not limiting the ideal functions of the cameras. This paper will suggest that these policies accomplish the necessary balancing required to determine whether BWCs should be used and whether the public should have access to footage. Although other papers have suggested it is possible to achieve accountability while protecting privacy, this paper will go a step further to emphasize policy considerations that take several ideals and limitations of BWCs into account.

To ensure that the ACLU and PCOC recommendations mitigate concerns while ensuring the ideals remain possible, other key elements must be included in a BWC policy.<sup>51</sup> Karson Kampfe, in the *Ohio State Law Review*, suggests such a framework for creating a detailed, clear, and strong policy regarding BWC programs, something called

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<sup>49</sup> Ibid., 4.

<sup>50</sup> Ibid.

<sup>51</sup> Karson Kampfe, “Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action,” *Ohio State Law Journal* 76, no. 5 (2015): 1187-1191, [http://moritzlaw.osu.edu/students/groups/oslj/files/2016/01/Vol.-76\\_5-1153-1200-Kampfe-Note.pdf](http://moritzlaw.osu.edu/students/groups/oslj/files/2016/01/Vol.-76_5-1153-1200-Kampfe-Note.pdf).

for by the ACLU and PCOC. First, the policy should outline the purpose and the scope of the BWC program being implemented.<sup>52</sup> Second, a policy or law must define key components of a BWC program, including the cameras, subjects, etc.<sup>53</sup> Third, the policy must then define the responsibilities of the officers wearing the cameras, as well as prohibited uses of BWCs.<sup>54</sup> It is in these sections that the recommendations by the ACLU and PCOC must be carefully considered and applied, including policy directives aimed at improving reliability, ensuring privacy, and reducing costs. Fourth, the system for reviewing and storing the BWC footage, again taking the ACLU and PCOC recommendations into account, should be articulated.<sup>55</sup> Finally, as recommended by both organizations, disciplinary measures should be defined in the event that the other elements of the policies are not followed.<sup>56</sup> Ultimately, by following this framework for drafting a policy, lawmakers or police officials can not only create a clear strong policy, but also take the ACLU and PCOC recommendations into account.

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

## *Chapter 2: Historical Context*

The recent deaths of McDonald, O’Neal, and other unarmed black men at the hands of law enforcement have sparked angry demonstrations in many cities across the United States. These demonstrations, as well as the distrust between police and black communities, have a long history in the nation. Suspicion of law enforcement officers and their motives is passed down from one generation to the next in many black communities. This chapter provides historical context to help explain the magnitude of this distrust, and to emphasize that BWCs are being asked to solve a social and cultural problem that has been one of the most vexing in the nation’s history.

### **Thirteenth Amendment & Peonage**

One starting point for tracing this distrust between the black community and law enforcement is the abolition of slavery by the Thirteenth Amendment, ratified in 1865.<sup>57</sup>

The amendment provides:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.<sup>58</sup>

Although the amendment formally ended slavery, it did not provide black individuals protection from the recreation of exploitation and brutality in new forms of chattel slavery.<sup>59</sup> One such new form of exploitation was “peonage,” in which an employer compels a worker to pay off a debt through work.<sup>60</sup> The most corrupt form of this debt slavery was enforced by the police and spanned from the 1870’s to World War II,

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<sup>57</sup> U.S. Const. amend. XIII, § 1.

<sup>58</sup> Ibid.

<sup>59</sup> Carol Anderson, *White Rage: The Unspoken Truth of Our Racial Divide* (New York: Bloomsbury, 2016), 43; Douglas A. Blackmon, *Slavery by Another Name: The Re-enslavement of Black People in America from the Civil War to World War II* (New York: Doubleday, 2008), 7.

<sup>60</sup> “Slavery v. Peonage,” *PBS*, March 6, 2017, <http://www.pbs.org/tpt/slavery-by-another-name/themes/peonage/>.

particularly in the South. Law enforcement officers or sheriffs arrested black men for “minor crimes or trumped-up charges” and forced them to work off high fines and court fees.<sup>61</sup> As part of this system, black men who became convicts or prisoners could and would be leased to commercial businesses, being paid little to nothing.<sup>62</sup> This “forced labor system,” even when the charges were for minor crimes, was legal under the Thirteenth Amendment as it allowed involuntary servitude as punishment for “duly convicted” criminals.<sup>63</sup> Records from the Reconstruction Era and after indicate the black men imprisoned were not thieves or criminals.<sup>64</sup> Instead, they were

thousands of random indigent citizens, almost always under the thinnest chimera of probable cause or judicial process ... inconsequential charges or for violations of laws specifically written to intimidate blacks – changing employers without permission, vagrancy, riding freight cars without a ticket, engaging in sexual activity – or loud talk – with white women.<sup>65</sup>

Another example is vagrancy laws, which allowed law enforcement to arrest black men or women in particular if they were not able to prove that they were employed.<sup>66</sup> Part of the Black Codes that limited the freedoms of former slaves, such as the right to vote, serve on juries, and work in occupations of their choice, vagrancy laws focused on black individuals, where the only true “offense was blackness.”<sup>67</sup>

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> U.S. Const. amend. XIII, § 1; Blackmon, *Slavery by Another Name*, 53.

<sup>64</sup> Blackmon, *Slavery by Another Name*, 7.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid., 1-7; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness Revised Edition* (New York: The New Press, 2012), 28-31.

<sup>67</sup> Blackmon, *Slavery by Another Name*, 1; Alexander, *The New Jim Crow*, 28-31; Anderson, *White Rage*, 19; “The Southern ‘Black Codes’ of 1865-66,” *Constitutional Rights Foundation*, accessed March 28, 2017, <http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>.

Thus, even when black men and women were supposedly free from slavery under the Thirteenth Amendment, many were trapped in a “forced labor system.”<sup>68</sup> And law enforcement played a large role, contributing to the division between police and black individuals that remains in our society today. Douglas A. Blackmon illustrates how “[peonage] was capriciously enforced by local sheriffs and constables.”<sup>69</sup> Slaves had been taught that their master “was a palpable extension of the power of God.”<sup>70</sup> Now, in the era of reconstruction, that role belonged to the sheriff.<sup>71</sup> The local sheriff did not earn a regular salary, but instead made money through official acts, including arresting black men and women, sometimes on the basis of mere rumor or speculation.<sup>72</sup> Although slave owners controlled black laborers during slavery, it was now the sheriffs who “controlled squads of black laborers available to the highest bidder.”<sup>73</sup> This system created a clear division and resulting distrust between black individuals and law enforcement, a prelude and precursor to the contemporaneous events contributing to the calls for BWCs and greater police accountability.

### **Fear or Myth of Black Crime**

During reconstruction and post-reconstruction, Southerners’ fears regarding black men and women began to change. During slavery, white Southerners feared that slaves would collectively revolt against Southern white men and kill white people.<sup>74</sup> However, after abolition, that fear of black slaves shifted to “fears of black crime,” or at least the “myth” of black crime, especially in the minds of those embracing the concept of

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<sup>68</sup> Blackmon, *Slavery by Another Name*, 7; Alexander, *The New Jim Crow*, 28-31; Anderson, *White Rage*, 19.

<sup>69</sup> Blackmon, *Slavery by Another Name*, 1.

<sup>70</sup> Ibid., 61.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid., 66.

<sup>73</sup> Ibid., 64.

<sup>74</sup> Joel Williamson, *A Rage for Order: Black/White Relations in the American South Since Emancipation* (New York: Oxford University Press, 1986), 83-84.

“radicalism,” an ideology emerging in the 1880s that viewed freed slaves as regressing back to “savagery and bestiality.”<sup>75</sup> For radicals, the most obvious manifestation was a perceived increase in the frequency of black men sexually assaulting white women and children.<sup>76</sup> Joel Williamson describes this perceived threat as being “thrust deeply into the psychic core of the South, searing the white soul, marking the character of the Southern mind radically and leaving it crippled and hobbled in matters of race.”<sup>77</sup> This new perception and fear of black crime, whether justified or not, would have consequences for decades to come, including lynchings, mass incarceration, and police brutality, culminating in the contemporary events of the deaths of unarmed black men at the hands of law enforcement.<sup>78</sup>

### **Lynching, Mass Incarceration, & Police Brutality**

The fear of black criminality was manifest in the 1890s when lynching – though it had existed for many centuries in Europe and the United States – became “a special ... occurrence in which black men were the special victims” throughout the United States.<sup>79</sup> In 1892, the number of lynchings of black men peaked at 156, not declining significantly until the 1930s.<sup>80</sup> Because “whites harbored growing fears of black criminality ... [they] clung to the notion that lynchings were the predictable consequence of black crime.”<sup>81</sup>

Although some sheriffs and other local law enforcement officers tried to stop lynching and other forms of mob violence, many other officers either actively engaged in

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<sup>75</sup> Alexander, *The New Jim Crow*, 42; Williamson, *A Rage for Order*, 71.

<sup>76</sup> Williamson, *A Rage for Order*, 71.

<sup>77</sup> Ibid., 84.

<sup>78</sup> Williamson, *A Rage for Order*, 71; Alexander, *The New Jim Crow*, 42.

<sup>79</sup> Williamson, *A Rage for Order*, 85.

<sup>80</sup> Ibid., 84-85.

<sup>81</sup> W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880-1930* (Urbana and Chicago: University of Illinois Press, 1993), 53.

the brutality or made no efforts to stop it.<sup>82</sup> For example, authorities in Virginia did not have the motivation and determination to uphold the law.”<sup>83</sup> In Georgia, authorities lacked “any inclination to jeopardize their local standing by protecting black prisoners at all costs.”<sup>84</sup> In New Orleans in 1900, groups of white men attacked black men throughout the city, “almost totally unchecked by police.”<sup>85</sup> Although law enforcement did not see themselves as allies of the white groups, “they handled the situation by arresting blacks who seemed too assertive and too approving” of other black men who fought back during the white assaults.<sup>86</sup>

A 1918 Special Committee in the United States House of Representatives found “many other cases of police complicity in the riots ... Instead of being guardians of the peace they became a part of the mob by countenancing the assaulting and shooting down of defenseless negroes and adding to the terrifying scenes of rapine and slaughter.”<sup>87</sup> In some cases, black ministers, newspaper editors, business groups, and others denounced local authorities for failing to prevent mob violence, including an incident in 1922 when a county policeman participated in a lynching of a black man.<sup>88</sup> This racial violence at the hands of law enforcement authorities is perhaps best illustrated in 1947 at the Anguilla Prison Camp in Brunswick, Georgia when guards shot at least fifteen black convicts, killing eight, after the prisoners attempted to escape.<sup>89</sup> The actions by the guards

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<sup>82</sup> Williamson, *A Rage for Order*, 135-139; Brundage, *Lynching in the New South*, 180.

<sup>83</sup> Brundage, *Lynching in the New South*, 180.

<sup>84</sup> *Ibid.*, 239.

<sup>85</sup> Williamson, *A Rage for Order*, 137.

<sup>86</sup> *Ibid.*

<sup>87</sup> U.S. Congress, House of Representatives, Special Committee Authorized by Congress to Investigate the East St. Louis Riots, Report, 1918, 65th Cong., 2<sup>nd</sup> sess., House Doc. 1231, Vol. 114, serial 7444, 8; Allen D. Grimshaw, “Actions of Police and the Military in American Race Riots,” *Phylon* 24, no. 3 (1963): 274, <http://www.jstor.org/stable/273402>.

<sup>88</sup> Brundage, *Lynching in the New South*, 238.

<sup>89</sup> *Ibid.*, 254.



“represented the evolution of the ruthless violence that southern posses and lawmen had inflicted upon black suspects for generations.”<sup>90</sup>

This history of violence against blacks perpetuated by law enforcement continued during the civil rights era.<sup>91</sup> A November 1961 report by the Civil Rights Commission, established by President Dwight Eisenhower to recommend policies related to civil rights issues, enumerated multiple accounts of police brutality across the United States.<sup>92</sup> Additionally, the report detailed the ongoing efforts of the Civil Rights Division of the Justice Department to prosecute police who had beaten, killed, or otherwise violated the rights of black Americans.<sup>93</sup> A subsequent commission, also formed in response to police brutality, was the National Advisory Commission on Civil Disorders (NACCD), established in 1968 by President Lyndon B. Johnson to examine the race riots that took place in Los Angeles, Chicago, Newark, and Detroit in the mid-1960s.<sup>94</sup> The commission published the Kerner Report, which concluded that the United States “was headed toward two separate and unequal societies: black and white.”<sup>95</sup> The report noted that the most “deeply held grievance” among black men and women was “police practices,” ranked even higher than unemployment and housing.<sup>96</sup>

One famous instance of police brutality during the Civil Rights Movement was the protest on May 4, 1963 in Birmingham, Alabama, in which “police used high-

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<sup>90</sup> Ibid.

<sup>91</sup> Sarah Brady Siff, “Policing the Police: A Civil Rights Story,” *Origins Current Events in Historical Perspective* 9, no. 8 (2016): 1-2, <http://origins.osu.edu/article/policing-police-civil-rights-story>; “Policing the Police and Prosecuting the Klan,” *The Leadership Conference*, accessed March 8, 2017, <http://www.civilrights.org/publications/reports/long-road/policing.html>.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> David G. Embrick, “Two Nations, Revisited: The Lynching of Black and Brown Bodies, Police Brutality, and Racial Control in ‘Post-Racial’ Amerikkka,” *Critical Sociology* 41, no. 6 (2015): 836-837, <http://journals.sagepub.com/doi/abs/10.1177/0896920515591950>.

<sup>95</sup> Ibid.

<sup>96</sup> Siff, “Policing the Police: A Civil Rights Story”; Embrick, “Two Nations, Revisited,” 837.

pressure fire hoses and vicious dogs to put down the demonstration.”<sup>97</sup> Another example came on “Bloody Sunday” in Selma, Alabama on March 7, 1965 when police tear-gassed, whipped, and trampled with horses nonviolent protestors calling for equal voting rights.<sup>98</sup> The protests at Birmingham and Selma carry historical significance for many reasons, and are not merely examples of police brutality toward black individuals. However, they represent glaring examples of the division between the black community and law enforcement. In the eyes of some black activists, the police brutality of the civil rights era mirrors the contemporary violence against black men by law enforcement, such as in the cases of Brown, Garner, McDonald, O’Neal, and others.

Finally, the mass incarceration of black Americans over the last four decades, requiring the involvement of law enforcement, further contributed to distrust by the black community.<sup>99</sup> Black men and women comprise only about 13 percent of the nation’s population, yet they account for about 45 percent of those incarcerated.<sup>100</sup> As a result, civil rights activists argue that felony convictions have “replaced the explicit use of race as the mechanism to deny black Americans their rights as citizens.”<sup>101</sup> In their view, mass incarceration is similar to the system of peonage that existed more than a century earlier.<sup>102</sup>

Because law enforcement is inextricably woven into this system, division and distrust with the black community in particular is inevitable. Police officers and officials

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<sup>97</sup> Ibid.

<sup>98</sup> Anderson, *White Rage*, 99; “Incident at Selma,” *New York Times*, March 9, 1965, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/116763272?accountid=14586>.

<sup>99</sup> Christopher Muller and Daniel Schrage, “Mass Imprisonment and Trust in the Law,” *The ANNALS of the American Academy of Political and Social Sciences* 651, no. 1 (2014): 139-158, <http://www.scholarsstrategynetwork.org/brief/mass-imprisonment-and-growing-distrust-law>.

<sup>100</sup> Anderson, *White Rage*, 136-137; Alexander, *The New Jim Crow*, 98-99, 134; Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 49, 52-53.

<sup>101</sup> Anderson, *White Rage*, 136.

<sup>102</sup> Ibid.

“assume the role of drug ‘experts,’” and are given discretion as to who to arrest, leading to a system of racial bias and profiling, with officers often targeting black individuals or focusing their efforts on the “hood.”<sup>103</sup> The result is the erosion of trust in law enforcement, continuing the trend of the black community’s “distrust of law [enforcement]” and “historical experiences with criminal justice institutions.”<sup>104</sup> Even if we disagree with the arguments and findings about the validity of the black incarceration rate, as some do, it does not diminish the perception in the black community that the police play a significant role in the high levels of incarceration of black people.<sup>105</sup>

The black community’s perception of racial bias by law enforcement remains at the heart of the BWC debate. At a March 2017 panel discussion hosted by the Falcon Heights, Minnesota Inclusion and Police Task Force, St. Paul Police Officer Nick Kellium illustrated the complexity of the relationship between the black community and law enforcement. Kellium discussed how black individuals’ perceptions of law enforcement as racist remain the same as 1964.<sup>106</sup> In a hypothetical scenario posed by Kellium, a black man is pulled over by a police officer who searches his car and “takes 20 minutes of his life.”<sup>107</sup> However, when the black individual is found to have done

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<sup>103</sup> Alexander, *The New Jim Crow*, 105, 124; Becky Pettit, *Invisible Men: Mass Incarceration and the Myth of Black Progress* (New York: Russell Sage Foundation, 2012), 50-82; Antonio Moore, “The Black Male Incarceration Problem Is Real and It’s Catastrophic,” *The Huffington Post*, Feb. 17, 2015, [http://www.huffingtonpost.com/antonio-moore/black-mass-incarceration-statistics\\_b\\_6682564.html](http://www.huffingtonpost.com/antonio-moore/black-mass-incarceration-statistics_b_6682564.html).

<sup>104</sup> Muller and Schrage, “Mass Imprisonment and Trust in the Law,” 139-158.

<sup>105</sup> Alex Mikulich, “The problem of mass incarceration is more complicated than we thought,” *America The Jesuit Review*, Feb. 9, 2017, <http://www.americamagazine.org/arts-culture/2017/02/09/problem-mass-incarceration-more-complicated-we-thought>; John Pfaff, *The True Causes of Mass Incarceration—and How to Achieve Real Reform* (New York: Basic Books, 2017), [https://books.google.com/books/about/Locked\\_In.html?id=BirXCwAAQBAJ&printsec=frontcover&source=kp\\_read\\_button&hl=en#v=onepage&q&f=false](https://books.google.com/books/about/Locked_In.html?id=BirXCwAAQBAJ&printsec=frontcover&source=kp_read_button&hl=en#v=onepage&q&f=false); James Forman, Jr., *Locking Up Our Own: Crime and Punishment in Black America* (New York: Farrar, Straus and Giroux, 2017), [https://books.google.com/books/about/Locking\\_Up\\_Our\\_Own.html?id=3NEjDQAAQBAJ](https://books.google.com/books/about/Locking_Up_Our_Own.html?id=3NEjDQAAQBAJ).

<sup>106</sup> Nick Kellium, (Panel Discussion, Falcon Heights, Minnesota, Inclusion and Police Task Force, Falcon Heights, MN, March 30, 2017).

<sup>107</sup> Ibid.

nothing wrong, he is let go without a citation.<sup>108</sup> Kellium asks all those present to put themselves in the shoes of the black individual:

So what am I thinking at that moment? Here's a racist cop, a cop that don't care about me, and here's a cop that continues to do the same thing that every other police officer had done since 1964 [with] Lyndon B. Johnson and the Police Commission Report. We are talking about the same thing.<sup>109</sup>

Kellium's reference to 1964 further demonstrates that the concerns of the black community, such as the perception that police officers are racist, are not new and have existed for generations in the United States.<sup>110</sup>

### **Rodney King**

A contemporaneous episode not only illustrates the deeply-rooted distrust between the black community and law enforcement, but is particularly relevant to the BWC debate because it adds the element of video footage recording the event. The events took place after 25-year-old black man Rodney King led police on a high speed chase, with speeds of up to 115 MPH.<sup>111</sup> King ignored several requests to leave his car after being pulled over and allegedly placed his left hand in his pants pocket, raising concerns he had a weapon.<sup>112</sup> Bystander video footage, shown by a Los Angeles television station and nationwide by Cable News Network (CNN), captured "at least a dozen officers surrounding the man after he left his car, kicking him and inflicting more than 40 blows with nightsticks as he lay on the pavement."<sup>113</sup> In the wake of the incident, several civil rights and watchdog groups reacted, characterizing it as "only one in a string of

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> Héctor Tobar, "Tape of L. A. Police Beating Suspect Stirs Public Furor," *Los Angeles Times*, March 6, 1991, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/1641868907?accountid=14586>.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

unprovoked beatings by officers.”<sup>114</sup> King’s wife said after the event ““I thought the police were supposed to protect us.””<sup>115</sup>

Both the state and federal trials resulting from the incident demonstrated the division between the police and the black community that was now receiving nationwide attention. On March 15, 1991, four officers, including Sergeant Stacey Koon and officers Laurence Michael Powell, Timothy Wind, and Theodore Briseno, were indicted by a grand jury in Los Angeles for their connection to the beating.<sup>116</sup> The officers were charged with assault with a deadly weapon and use of excessive force.<sup>117</sup> Seventeen other officers who were present at the beating, but were not shown as participating, were not indicted.<sup>118</sup> As this paper will discuss in a later chapter, the use of the bystander video of the beating was heavily used by the prosecution. However, despite the video evidence, on April 29, 1992, the officers were acquitted of assault and use of excessive force, leading to riots throughout Los Angeles.<sup>119</sup> The riots lasted five days, leaving nearly 60 people dead and more than 2,000 injured.<sup>120</sup> Nearly 12,000 people were arrested and estimated damage in the Los Angeles area was over \$1 billion.<sup>121</sup> The *Los Angeles Sentinel*, an African American-owned and operated newspaper, on May 7, 1992 described the riots:

[They] chant[ed] ‘No justice, no peace’ as a rallying cry, hordes of arsonists and opportunistic looters systematically set[ting] about their self-assigned duty of destroying their immediate environments, leaving widespread areas of the city indistinguishable from Baghdad after the Desert Storm operation.<sup>122</sup>

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<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

<sup>116</sup> “Los Angeles Riots Fast Facts,” *CNN Library*, April 8, 2016, <http://www.cnn.com/2013/09/18/us/los-angeles-riots-fast-facts/>.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ron Dungee, “The Legacy of Rodney King,” *Los Angeles Sentinel*, May 7, 1992, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/565606417?accountid=14586>.

During the spring of 1992, the riots spread across the nation, including in Atlanta where protestors overturned police cars.<sup>123</sup> The violence only abated after Rodney King spoke out and called for peace in Los Angeles, famously asking, “Can we all get along?”<sup>124</sup> He added that the people killed in the riots “will never come home to their families again ... We’ve got to quit.”<sup>125</sup> Over the course of five days, the distrust and division between the black community and law enforcement was visible on a national scale.

After the acquittals at the state level, and the subsequent riots, the United States Department of Justice sought indictments for violation of King’s civil rights. On August 4, 1992, a grand jury indicted the four officers, leading to a trial in the United States District Court for the Central District of California.<sup>126</sup> The trial began on February 25, 1993, with King testifying on March 9, which he had not done at the state trial.<sup>127</sup> King described the beating, including how the officers “taunted him with racial epithets, threatened to kill him and provoked him to try to flee before clubbing him in the head with a baton.”<sup>128</sup> For the first time in either trial, race was injected and could no longer be ignored.<sup>129</sup> King’s calm demeanor ran “counter to the picture painted then by defense lawyers of an aggressive, violent felon.”<sup>130</sup> But despite the element of race, the federal judge “showed sympathy for the officers” because they already had experienced vilification during the judicial proceedings.<sup>131</sup> Only two of the officers received jail

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<sup>123</sup> Ibid.

<sup>124</sup> ““Can we all get along,”” *Chicago Tribune*, May 2, 1992, <http://search.proquest.com/docview/1688721506/43D2F1C009064D49PQ/2?accountid=14586>.

<sup>125</sup> Ron Dungee, “The Legacy of Rodney King.”

<sup>126</sup> “Los Angeles Riots Fast Facts,” *CNN Library*.

<sup>127</sup> Ibid.

<sup>128</sup> Seth Mydans, “Rodney King Testifies on Beating: ‘I was just Trying to Stay Alive’,” *New York Times*, March 10, 1993, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/109211661?accountid=14586>.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Seth Mydans, “Sympathetic Judge Gives Officers 2 1/2 Years in Rodney King Beating,” *New York Times*, Aug. 5, 1993, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/109017766?accountid=14586>.

time.<sup>132</sup> Powell received 30 months in prison for using “unreasonable force.”<sup>133</sup> Koon also received 30 months for failing to stop the unlawful beating of King.<sup>134</sup> Unlike in the spring of 1992, no riots occurred, but both groups were unhappy with the result, for different reasons. Fellow officers did not like to see their colleagues “going to the joint;” critics of the officers saw the sentences as “unfairly lenient.”<sup>135</sup>

Taken together, the beating of King, the ensuing trials, and the commentary and violence following different aspects of the judicial process, present a case study of the division and distrust between the black community and the police. It is one of many events that provide the context for the calls for BWCs in the wake of contemporaneous police killings of unarmed black men. Later in the paper, a case study of bystander footage will help demonstrate both the power and the pitfalls of video footage as a tool for finding the truth and providing accountability.

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> “L.a. Officers Get 2 1/2 Years Judge Praises Defendants, Blames Rodney King,” *Los Angeles Times*, Aug. 5, 1993, [http://articles.sun-sentinel.com/1993-08-05/news/9301280078\\_1\\_stacey-koon-officers-powell](http://articles.sun-sentinel.com/1993-08-05/news/9301280078_1_stacey-koon-officers-powell).

### Chapter 3: Theoretical Framework

To analyze the arguments for and against BWCs, this paper utilizes First Amendment theories that are normally applied to the press and political speech. However, the functions of “instrument of the search for truth” and “checking value” mirror the role advocates believe BWCs can play. They believe the cameras can provide evidence that will bring clarity to interactions between the police and the public as well as a means of providing greater law enforcement accountability. This paper also uses First Amendment theory to introduce and demonstrate the necessity of balancing these perceived benefits with the limitations, concerns, and harms of BWCs, including their accuracy and their threat to individual privacy.

#### **Instrument of the Search for Truth**

Under First Amendment theory, the important function of free speech and a free press is to be an “instrument of the search for truth,” similar to the use of BWCs as a means of providing evidence of police misconduct and documenting police encounters with the public.<sup>136</sup> Garvey and Schauer argue that the “earliest basis for the defense of freedom of speech and freedom of the press ... [and] likely also the most enduring ... is free speech as the instrument of the search for truth.”<sup>137</sup> This idea of the search for truth can be traced back, according to Garvey and Schauer, to John Milton’s *Areopagitica*, a speech to Parliament in 1644, in which he said “let [Truth] and Falsehood grapple; who ever knew Truth put to the wors [sic], in a free and open encounter.”<sup>138</sup> Perhaps most famously, Justice Oliver Wendell Holmes Jr., in his dissent in *Abrams v. United States*,

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<sup>136</sup> John H. Garvey and Frederick Schauer, *The First Amendment: A Reader Second Edition* (St. Paul, Minnesota: West Publishing Co., 2002), 57-58; Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 6.

<sup>137</sup> Garvey and Schauer, *The First Amendment: A Reader Second Edition*, 57-58.

<sup>138</sup> *Ibid.*; *Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England* (New York: The Grolier Club, 1890), 167.



wrote that “the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [people’s] wishes safely can be carried out. That at any rate is the theory of our Constitution.”<sup>139</sup>

## Checking Value

A second First Amendment theory that helps illuminate a perceived benefit of BWCs is the “checking value” of the press, articulated by Vincent Blasi. Blasi contends that “a primary purpose of the freedoms of speech and press, then and now, [is] to check government as a way of preventing abuses.”<sup>140</sup> He continues, “one of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them ... the checking value rests on a most impressive foundation.”<sup>141</sup> Blasi cites John Locke’s *Second Treatise on Civil Government* in which he “set forth an influential theory that the general citizenry has a right to overthrow rulers who abuse the public trust.”<sup>142</sup> Thus, the “checking value,” also referred to as “the press’s watchdog role,” requires the monitoring of conduct of government and other officials as a means achieving accountability and transparency, a long-held norm of how the press ought to operate as a vital part of democracy.<sup>143</sup>

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<sup>139</sup> *Abrams v. United States*, 250 U.S 616 (1919).

<sup>140</sup> Vincent Blasi, “The Checking Value in First Amendment Theory,” in *The First Amendment: A Reader Second Edition*, John H. Garvey and Frederick Schauer (St. Paul, Minnesota: West Publishing Co., 2002), 2-7.

<sup>141</sup> *Ibid.*, 7.

<sup>142</sup> *Ibid.*

<sup>143</sup> Warren Francke, “The Evolving Watchdog: The Media’s Role in Government Ethics,” *The ANNALS of the American Academy of Political and Social Science* 537, no. 1 (2016): 109, <http://journals.sagepub.com/doi/abs/10.1177/0002716295537000010>.

## Balancing Accuracy and Privacy

Although “instrument of the search for truth” and “checking value” are desired functions of the press (and BWCs), it is not enough to simply lay out these ideals. Instead, there needs to be a way to balance the potential benefits of the press and body cameras with their limitations or harms.

Thomas Scanlon argues in *A Theory of Freedom of Expression* that “freedom of expression ... rests upon a balancing of competing goods.”<sup>144</sup> Following Scanlon’s argument, limitations of or harms caused by an entity or technology must be taken into account and balanced with perceived benefits.<sup>145</sup> Two of the public interests that must be weighed against the press’s ideal functions are found in the BWC debate.

One such public interest is the expectation of reliable and accurate content. In order for the press to act most responsibly to the public, “the news media should be accurate” or risk causing negative consequences on society.<sup>146</sup> As a result, although the media are expected to produce timely news, the accuracy of the content being produced is also essential. Thus, ideals of the press – in this case timeliness – needs to be balanced with other considerations, such as reliability and accuracy, to ensure the press acts in a way that is most responsible to the public interest.<sup>147</sup>

A second limitation on the perceived benefits of truth and accountability is privacy rights of individuals. Stanley Ingber argues that “the value of privacy may constitute a counterforce of perhaps equal symbolic and societal influence to the values

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<sup>144</sup> Thomas Scanlon, “A Theory of Freedom of Expression,” in *The First Amendment: A Reader Second Edition*, John H. Garvey and Frederick Schauer (St. Paul, Minnesota: West Publishing Co., 2002), 130-132.

<sup>145</sup> Yun, “Social Responsibility Theory,” 749; Ravi, “Media And Social Responsibility,” 306-321; Gunaratne and Hasim, “Social Responsibility Revisited,” 97-107.

<sup>146</sup> Wilbur Schramm, *Responsibility on Mass Communication* (New York: Harper & Brothers, 1957), 218.

<sup>147</sup> Ibid.

embodied in the [F]irst [A]mendment.”<sup>148</sup> Ingber provides an example of “privacy invasion cases [where] there may be a more equal balance between the significance of [F]irst [A]mendment and privacy values.”<sup>149</sup> The privacy rights of an individual must be considered, even if it comes at the cost of an absolutely free press or other First Amendment values, including the press being an instrument of the search for truth and its checking value.

### **Applying Framework to BWCs**

Although the First Amendment theories presented above are most often applied to the press, there are three reasons why they can also apply to BWC debate: the framework takes into account the importance of societal and public interests in relation to BWCs; similar issues are presented in terms of the press and in terms of BWCs; and the framework requires balancing the benefits with limitations and harms, which is necessary to ensure strong, appropriate policies are created and applied.

The debate over the implementation of BWCs puts public and societal interests at the forefront of national attention, an element accounted for in “instrument of the search for truth” and “checking value.” As discussed earlier, high profile shootings and deaths of unarmed black men across the country contributed to increased calls for BWCs as mechanisms for discovering the truth and increased accountability of law enforcement, despite concerns over the accuracy, privacy, costs. These events demonstrate the distrust and division between the black community and law enforcement, falling under a historical pattern that helps explain the desire for truth and accountability.

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<sup>148</sup> Stanley Ingber, “Rethinking Intangible Injuries, Focus on Remedy,” in *The First Amendment: A Reader Second Edition*, John H. Garvey and Frederick Schauer (St. Paul, Minnesota: West Publishing Co., 2002), 335.

<sup>149</sup> Ibid.

Second, as alluded to above and as this paper will next discuss further, the ideal functions associated with BWCs are similar to those applied to the press. Although not exactly the same, BWCs, like the press, aim to be (1) an instrument of the search for truth and (2) a mechanism for holding law enforcement accountable. Conversely, the problems of (1) reliability and accuracy, (2) privacy, and (3) costs must be balanced with the perceived benefits of BWCs, like with the press.

Finally, these theories are helpful tools to understand and analyze the balancing required of police executives and lawmakers when they consider what policies to implement and what considerations to weigh.<sup>150</sup> At the same time, the requirement of balancing benefits versus limitations also helps justify recommended policies for BWCs. As this paper will argue, strong policies are necessary for BWCs to ensure that they benefit the most people while recognizing limitations or harms. The framework proposed in this chapter helps justify recommendations made by the ACLU and PCOC and, therefore, provides several practical means for law enforcement agencies to develop the most balanced policies.<sup>151</sup>

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<sup>150</sup> Josh Sanburn, “Why Police Departments Don’t Always Release Body Cam Footage,” *Time*, Aug. 17, 2016, <http://time.com/4453310/milwaukee-police-sylville-smith-body-cams/>.

<sup>151</sup> “Research on Body-Worn Cameras and Law Enforcement,” *National Institute of Justice*, Jan. 3, 2017, <https://www.nij.gov/topics/law-enforcement/technology/pages/body-worn-cameras.aspx>.

## Chapter 4: Ideals & Perceived Benefits of BWCs

### Instrument of the Search for Truth

Ideally, BWCs, as discussed in the previous chapter and called for by supporters of the cameras, will be used as an “instrument of the search for truth.”<sup>152</sup> The number one reason police departments say they choose to use BWCs is to provide a more accurate documentation of police encounters with the public.<sup>153</sup> The cameras create a “permanent record of the events that transpired,” leading to the perceived benefit of providing an objective, unambiguous view of an event.<sup>154</sup> The footage can then be used as evidence in a trial or to resolve complaints or incidents between police and the public.<sup>155</sup>

At the very least, BWCs are perceived to be a means of finding the truth. For example, a *Duluth News Tribune* editorial argues that “Ferguson may never have happened ... with irrefutable video evidence of exactly what went down. ... Everyone would be able to see the truth now rather than embracing the version of the truth that fits best with their biases and their mindset when it comes to race and the police.”<sup>156</sup> In an interview with *The Daily Signal*, a multimedia news platform created by the Heritage Foundation, Salt Lake City Assistant Police Chief Tim Doubt echoed this perception: “In this country [law enforcement] lost trust in the last couple of years with the public, and that body camera helps tell more of the truth.”<sup>157</sup>

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<sup>152</sup> Garvey and Schauer, *The First Amendment: A Reader Second Edition*, 57-58.

<sup>153</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 6.

<sup>154</sup> Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence* (Washington, DC: Office of Community Oriented Policing Services, 2014), 24, <https://www.ojpdiagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf>.

<sup>155</sup> Ibid.

<sup>156</sup> “Our View: Equipping cops with body cameras improves odds of finding the truth,” *Duluth News Tribune*, Sept. 28, 2014, <http://www.duluthnewstribune.com/content/our-view-equipping-cops-body-cameras-improves-odds-finding-truth>.

<sup>157</sup> Josh Siegel, “Why Police Say Body Cameras Can Help Heal Divide With Public,” *The Daily Signal*, July 28, 2016, <http://dailysignal.com/2016/07/18/why-police-say-body-cameras-can-help-heal-divide-with-public/>.

One particular way BWCs can potentially tell the truth, according to supporters, is by providing a *potentially* objective, unambiguous view of what happened, seemingly without bias or inaccuracies.<sup>158</sup> BWCs are, ideally, expected to provide “a contemporaneous, objective record” and an “unambiguous” account of police-civilian encounters.<sup>159</sup> As a result, the footage has the potential to “expose officer misconduct,” such as the use of excessive force, and “exonerate civilians whose actions have been falsely characterized by the police.”<sup>160</sup> Conversely, the footage could also be used to determine whether an officer committed any wrong-doing in his or her interaction with the public.<sup>161</sup>

Thus, in the case of a jury trial, if BWCs can achieve their ideal function, jurors would be presented with a more objective account, meaning subjective testimonies could be supported, or discounted, by the footage.<sup>162</sup> BWC footage “could objectively illustrate the proximity of the subject to the officer and whether the subject had a weapon or anything that could reasonably be construed as a weapon,” for example.<sup>163</sup> As a result, the footage would eliminate “issues of credibility, or at least show one version of the event that reasonable jurors could interpret.”<sup>164</sup> Judge Shira A. Scheindlin, a senior United States district judge for the Southern District of New York, provides an example of this scenario in a situation where police officers tell one story and the suspect tells another during a trial.<sup>165</sup> In a case originating in Chicago, the officers testified that a driver did not use his turn signal, refused to hand over his license and registration when

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<sup>158</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540 (2013); “Considering Police Body Cameras,” 1800-1803; Simmons, “Body-mounted Police Cameras,” 884-885.

<sup>159</sup> *Ibid.*

<sup>160</sup> “Considering Police Body Cameras,” 1799.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*, 1813.

<sup>163</sup> Simmons, “Body-mounted Police Cameras,” 885.

<sup>164</sup> *Ibid.*

<sup>165</sup> Shira A. Scheindlin, “Will the widespread use of body cameras improve police accountability? Yes,” *Americas Quarterly Technology in Latin America* 9, no. 2 (2015): 24-27, <http://www.americasquarterly.org/node/7329>.

asked, and that he had marijuana in the back seat of his car.<sup>166</sup> However, the suspect told a different story, saying he had used his turn signal, was never asked for his license and registration, and the marijuana was hidden under the back seat.<sup>167</sup> When the suspect's lawyer subpoenaed and obtained a video recorded by one of the police car dash cameras, the footage revealed that the suspect, immediately after being pulled over and removed from his car, was frisked and handcuffed, with a search of the vehicle occurring after.<sup>168</sup> According to Judge Scheindlin, this case demonstrates the importance of the video because without it, "it would have been hard for a judge to find that five police officers had lied under oath while a guy caught with a pound of marijuana had told the truth."<sup>169</sup> Thus, the addition of BWCs would offer another record of events, providing a jury with a more objective view to help resolve discrepancies between the accounts of police officer(s), eyewitness(es), suspects, and, potentially, victim(s).<sup>170</sup>

BWCs also ostensibly have the ability to resolve complaints arising from incidents between police and the public.<sup>171</sup> More specifically, the physical footage provided by BWCs "helps lead to a quicker resolution ... [and] having video from a body-worn camera can help resolve [any] questions."<sup>172</sup> Studies in the United Kingdom suggest that BWCs have the perceived benefit of facilitating efficient resolutions of citizen complaints due to greater accuracy.<sup>173</sup> The Renfrewshire/Aberdeen studies in Scotland found that "the process of considering any complaint was made much easier by

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<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> *Floyd*, 959 F., Supp. 2d 540; "Considering Police Body Cameras," 1800-1803; Simmons, "Body-mounted Police Cameras," 884-885.

<sup>171</sup> "Considering Police Body Cameras," 1799-1801; Simmons, "Body-mounted Police Cameras," 885-886.

<sup>172</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 6.

<sup>173</sup> "Considering Police Body Cameras," 1801.

using evidence from [body worn] cameras.”<sup>174</sup> The Plymouth Head Camera Project reported that the incidents recorded by body cameras were more likely to be resolved through guilty pleas rather than criminal trials, indicating the ability for BWCs to provide an objective view that could prove or disprove the testimony of the subject, eyewitnesses, or police officers.<sup>175</sup>

In addition to resolving civilian complaints against law enforcement, BWCs can also help resolve more serious incidents, including officer-involved shootings.<sup>176</sup> Former Topeka, Kansas Police Chief Ron Miller provided one example in which the local district attorney cleared an officer in a deadly shooting incident based on the BWC footage.<sup>177</sup> The camera captured the event in real time, providing physical evidence demonstrating the officer was innocent of any wrongdoing.<sup>178</sup>

Court precedent from cases dealing with dash camera footage provides evidence that BWCs could also help to determine the truth of what happened in a confrontation between police and members of the public.<sup>179</sup> *Lampkin v. State* is an example of a case in which dash camera footage was used to determine whether the testimony of a defendant or of law enforcement was more accurate.<sup>180</sup> In this case, dash camera footage corroborated the officer’s testimony that the defendant was intoxicated at the time of the arrest.<sup>181</sup> In *Scott v. Harris*, the Supreme Court found that because the videotape shown in

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<sup>174</sup> White, *Police Officer Body-Worn Cameras*, 23; ODS Consulting, *Body Worn Video Projects in Paisley and Aberdeen, Self Evaluation* (Glasgow: ODS Consulting, 2011), 1-19, <http://www.bwvsg.com/wp-content/uploads/2013/07/BWV-Scottish-Report.pdf>.

<sup>175</sup> “White, *Police Officer Body-Worn Cameras*, 23; Martin Goodall, *Guidance for the Police Use of Body-Worn Video Devices* (London: Home Office, 2007), <http://revealmedia.com/wp-content/uploads/2013/09/guidance-body-worn-devices.pdf>.

<sup>176</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 7.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> Stephen E. Henderson, “Fourth Amendment Time Machines (And What They Might Say About Police Body Cameras),” *University of Pennsylvania Journal of Constitutional Law* 18 (2015): 960, <http://heinonline.org/HOL/Page?public=false&handle=hein.journals/upjcl18&page=933&collection=journals#>.

<sup>180</sup> *Lampkin v. State*, 470 S.W.3d 876 (Tex. Ct. App. 2015).

<sup>181</sup> *Id.*



the lower courts “blatantly contradicted” the plaintiff’s version of the events, the lower courts should not have adopted the plaintiff’s version of the facts.<sup>182</sup> The Supreme Court therefore ruled that the officers acted reasonably when they used deadly force in attempting to stop a fleeing motorist.<sup>183</sup> In *Rudlaff v. Gillispie*, the Sixth Circuit Court of Appeals used dash camera footage to determine that an officer’s use of a taser and knee strike were reasonable under the Fourth Amendment.<sup>184</sup> The *Lampkin*, *Scott* and *Rudlaff* cases all demonstrate situations in which police were found to have acted reasonably, suggesting that BWCs can support and benefit the police in addition to the public. Conversely, *United States v. Abarza* provides an example in which the officer’s testimony was found to be largely untrue.<sup>185</sup> Judge Michael J. McShane of the District of Oregon U.S Federal Court found dash camera video to be “very useful to my findings on the circumstances of this traffic stop,” suggesting the footage was helpful in determining the truth of what happened.<sup>186</sup> He concluded that the testimony of the two officers in the case, about the circumstances of the traffic stop, were overstated.”<sup>187</sup> Although these cases rely on dash camera footage and not BWCs, it is possible that body cameras could, in fact, have similar, or perhaps even better, effects in terms of being an instrument of truth used to enhance accountability. Because they can get closer to scenes taking place, include audio, and provide an additional source of footage beyond dash cameras, BWCs produce an additional means of obtaining the truth, potentially benefiting both the public as well as law enforcement.

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<sup>182</sup> *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>183</sup> *Id.*

<sup>184</sup> *Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015).

<sup>185</sup> *United States v. Abarza*, 143 F.Supp.3d 1082 (D. Or. Nov. 6, 2015).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

## Accountability

In the 2013 New York district court case *Floyd v. City of New York*, over a year before the high-profile shooting of Michael Brown and death of Eric Garner, Judge Shira A. Scheindlin, a senior United States district judge for the Southern District of New York ordered “the NYPD to institute a pilot project in which body-worn cameras will be worn for a one-year period by officers on patrol in one precinct per borough – specifically the precinct with the highest number of stops during 2012.”<sup>188</sup> One of her major reasons for the order was her belief that the New York Police Department would be unable, without BWCs, to hold officers accountable for stop and frisks, which she ruled violated the Fourth Amendment because they were conducted in a racially discriminatory manner.<sup>189</sup> Following the ruling, New York Mayor Bill de Blasio observed “This pilot program will provide transparency, accountability, and protection for both the police officers and those they serve.”<sup>190</sup> In subsequent years, the high-profile deaths of unarmed black men, and the resulting division between minority communities and law enforcement, would bring the calls for BWCs and accountability into the national spotlight.<sup>191</sup>

The Merriam-Webster dictionary defines accountability as “an obligation or willingness to accept responsibility or to account for one's actions.”<sup>192</sup> The Oxford English Living Dictionary defines accountable as being “required or expected to justify actions or decisions; responsible.”<sup>193</sup> Although these definitions may represent the

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<sup>188</sup> *Floyd*, 959 F., Supp. 2d 540; Scheindlin, “Will the widespread use of body cameras improve police accountability? Yes,” 24-27.

<sup>189</sup> *Ibid.*

<sup>190</sup> Harry Bruinius, “New York police test body cameras: Effective deterrent or privacy violation,” *The Christian Science Monitor*, Sept. 5, 2014, <http://www.csmonitor.com/USA/Justice/2014/0905/New-York-police-test-body-cameras-Effective-deterrent-or-privacy-violation>.

<sup>191</sup> White, *Police Officer Body-Worn Cameras*, 32; Simmons, “Body-mounted Police Cameras,” 882-883; Alexandra Mateescu, Alex Rosenblat, and danah boyd. “Dreams of Accountability, Guaranteed Surveillance: The Promises and Costs of Body-Worn Cameras,” *Surveillance & Society* 14, no. 1 (2016): 122-127.

<sup>192</sup> “Accountability,” *Merriam-Webster Dictionary*, 2017, <https://www.merriam-webster.com/dictionary/accountability>.

<sup>193</sup> “Accountable,” *Oxford University Press*, 2017, <https://en.oxforddictionaries.com/definition/accountable>.

essence of what the public is demanding in response to police misconduct, there has been little research into how accountability of law enforcement will actually be accomplished by BWCs.<sup>194</sup> Moreover, what accountability of the police should look like has not been fully defined or explained.<sup>195</sup>

Accordingly, this paper will suggest how BWCs can be an accountability mechanism for law enforcement, a value mirroring the press's "checking value."<sup>196</sup> There are two particular ways in which BWCs can provide this accountability: (1) by being a means of finding the truth, as discussed above, and (2) by increasing transparency of law enforcement officers' and agencies' actions and operations, each allowing for connected perceived benefits of BWCs.

The first way BWCs have helped improve police accountability is by providing an independent account of interactions between the police and the public, which would, ideally, be a means of finding the truth of what happened. This was discussed above as a norm governing how BWCs ought to operate, similar to the press in being an "instrument of the search for truth."<sup>197</sup> Because BWCs provide investigators and court actors a record of interrogations, arrests, and other elements involved in an investigation or court case, BWCs can be a means of providing accountability.<sup>198</sup> The footage not only provides a means of proving or disproving different testimonies, but also concrete, reliable evidence for the court that, ideally, determines whether police misconduct occurred or not.<sup>199</sup> Put

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<sup>194</sup> Ibid.

<sup>195</sup> Mateescu, Rosenblat, and boyd, "Dreams of Accountability," 122-127.

<sup>196</sup> Vincent Blasi, "The Checking Value in First Amendment Theory," in *The First Amendment: A Reader Second Edition*, John H. Garvey and Frederick Schauer (St. Paul, Minnesota: West Publishing Co., 2002), 2-7; Warren Francke, "The Evolving Watchdog: The Media's Role in Government Ethics," *The ANNALS of the American Academy of Political and Social Science* 537, no. 1 (2016): 109-121,

<http://journals.sagepub.com/doi/abs/10.1177/0002716295537000010>; Fredrick S. Siebert, Theodore Peterson, and Wilbur Schramm, *Four Theories of the Press* (Urbana and Chicago: University of Illinois Press, 1963).

<sup>197</sup> Garvey and Schauer, *The First Amendment: A Reader Second Edition*, 57-58.

<sup>198</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 9.

<sup>199</sup> Ibid.

simply, BWCs can provide evidence of police misconduct for use in departmental discipline, court cases, and other forms of holding officers or departments accountable.

Here, it is helpful to return to *United States v. Abarza*.<sup>200</sup> The court's conclusion, that the testimony of the two officers about the traffic stop was overstated, suggests that the camera footage was used in determining the truth of what actually happened.<sup>201</sup> Judge McShane found that the "[p]olice troopers unreasonably prolonged the traffic stop."<sup>202</sup> Although not as serious as cases involving shootings or violence, this case exemplifies how camera footage can be used to corroborate police misconduct in an interaction with the public and, as a result, act as an accountability mechanism for law enforcement.<sup>203</sup>

The second way BWCs may strengthen accountability is by increasing transparency of police departments, making their actions and operations, including examples of misconduct or criminal acts, more visible to the public.<sup>204</sup> Because BWCs provide a video record of police activity, they help to open up a department or an officer to outside scrutiny.<sup>205</sup> BWCs make greater transparency possible because the recorded footage can be immediately reviewed or scrutinized, allowing for oversight from the public, departments, lawmakers, and others, as well as reflection on police actions.<sup>206</sup> As a result, BWCs represent "the pinnacle of transparency in law enforcement."<sup>207</sup>

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<sup>200</sup> *Abarza*, 143 F.Supp.3d 1082.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 5-9; Justin T. Ready and Jacob T. N. Young, "The impact of on-officer video cameras on police-citizen contacts: Findings from a controlled experiment in Mesa, AZ," *Journal of Experimental Criminology* 11, no. 3 (2015): 445-458, <https://link.springer.com/article/10.1007/s11292-015-9237-8>.

<sup>205</sup> White, *Police Officer Body-Worn Cameras*, 19.

<sup>206</sup> Barak Ariel, et al., "'Contagious Accountability' A Global Multisite Randomized Controlled Trial on the Effect of Police Body-Worn Cameras on Citizens' Complaints Against the Police," *Criminal Justice and Behavior* 44, no. 2 (2016): 293-316, <http://journals.sagepub.com/doi/abs/10.1177/0093854816668218>.

<sup>207</sup> White, *Police Officer Body-Worn Cameras*, 19; Mark W. Clark, "On-Body Video: Eye Witness or Big Brother," *Police Magazine*, July 8, 2013, <http://www.policemag.com/channel/technology/articles/2013/07/on-body-video-eye-witness-or-big-brother.aspx>.

This desire for transparency, and accountability more generally, can be found in two pieces of legislation passed between 2015-2016. In Washington State, Section 1 of House Bill 2362 reads: “The legislature finds that technological developments present opportunities for additional truth-finding, transparency, and accountability in interactions between law enforcement or corrections officers and the public.”<sup>208</sup> In this provision, the legislation highlights the ways in which BWCs can potentially provide accountability: “truth-finding” and “transparency.”<sup>209</sup> In Illinois, Section 10-5 of Public Act 099-0352 includes: “the uses of officer-worn body cameras will help collect evidence while improving transparency and accountability.”<sup>210</sup> Once again, the legislation emphasizes both the ability of BWCs to provide evidence, as well as increasing transparency. The desire for accountability is also present in department policies, such as in Minneapolis, which includes “the goal of enhancing accountability and public trust ... by preserving evidence of officer interaction with citizens.”<sup>211</sup>

Consequently, BWCs have several perceived benefits connected to the ideal of accountability, including (1) as a mechanism for correcting internal problems (2) helping prevent police misconduct, (3) resolving complaints and incidents between police and the public, as well as decreasing complaints, (4) promoting officer safety, and (5) increasing community support and trust in the police.

First, BWC footage can be used to correct internal department problems.<sup>212</sup> In a survey by PERF, 94 percent of respondents reported using BWC footage to train officers and for administrative reviews.<sup>213</sup> BWCs have been called a “training tool” that allows

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<sup>208</sup> WASH. REV. CODE § 42.56 (2017).

<sup>209</sup> Ibid.

<sup>210</sup> Police and Community Relations Improvement Act, Illinois Public Act 099-0352 (2015).

<sup>211</sup> “Body Worn Cameras”; Minneapolis Police Department § 4-223 MOBILE AND VIDEO RECORDING (MVR) POLICY [http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy\\_4-200\\_4-200](http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_4-200_4-200).

<sup>212</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 7.

<sup>213</sup> Ibid.

departments to help improve officer performance in several ways, including scenario-based training, evaluation of new officers, and identification of areas where further training is needed.<sup>214</sup> In situations where misconduct or questionable behavior occurs, BWC footage can be used not only to identify the officers committing the misconduct, but also to try to avoid the conduct reaching that level in the first place.<sup>215</sup> In some cases, the BWCs may show officers adhering to departmental policy and working in a manner that respects the public, examples that can also be used in training.<sup>216</sup> As a result, BWCs can “demonstrate what actual, on-the-ground civilian encounters should (and should not) look like.”<sup>217</sup> Additionally, BWC footage can be used to address structural problems within the department, such as revising departmental policies and protocols, including those related to racial profiling.<sup>218</sup>

A second perceived benefit of BWCs and accountability is helping to prevent problems from happening in the first place, such as police misconduct and the use of force by officers.<sup>219</sup> By increasing officer professionalism and helping to improve officer performance, BWCs can “prevent problems from arising in the first place.”<sup>220</sup> Here, it is necessary to include the few limited empirical studies on BWCs in the United States. In a study conducted in Rialto, California, officer shifts without BWCs had twice as many incidents in which force was used as shifts with BWCs.<sup>221</sup> Use of force incidents fell by

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<sup>214</sup> Ibid.; White, *Police Officer Body-Worn Cameras*, 25; “Considering Police Body Cameras,” 1794-1817; Simmons, “Body-mounted Police Cameras: A Primer on Police Accountability vs. Privacy,” 882-922.

<sup>215</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 7; Simmons, “Body-mounted Police Cameras,” 885-887.

<sup>216</sup> Simmons, “Body-mounted Police Cameras,” 885-887.

<sup>217</sup> “Considering Police Body Cameras,” 1802.

<sup>218</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 8; Simmons, “Body-mounted Police Cameras,” 885-887.

<sup>219</sup> Ibid.

<sup>220</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 5.

<sup>221</sup> William Farrar, “Operation Candid Camera: Rialto Police Department’s Body-Worn Camera Experiment,” *The Police Chief* 81 (2014): 20–25, <https://nationaluasi.com/dru/Operation-Candid-Camera-Rialto-Police-Department%E2%80%99s-Body-Worn-Camera-Experiment-012514>.

2.5 times per 1,000 contacts as compared with the 12 months prior to BWCs being used.<sup>222</sup> A study conducted in Orlando, Florida also found that incidents involving the police, called “response-to-resistance (R2R) incidents” fell by 53.4 percent for officers who wore BWCs for the study, with up to 40 percent of officers who wore the cameras feeling it affected both their behavior and citizen behavior.<sup>223</sup> Finally, a 2012 study conducted by the Mesa, Arizona Police Department found that there were 75 percent fewer use of force complaints for officers who wore BWCs.<sup>224</sup> Although questions remain as to whether the reduction in use of force can be entirely attributed to BWCs, it does appear that BWCs can help lower rates of police misconduct by acting as a deterrent.<sup>225</sup>

Connected to this idea of preventing problems from occurring in the first place is the third perceived benefit of BWCs: decreased complaints by the public. Although questions remain about the correlation between BWCs and decreasing complaints, the limited empirical studies that exist suggest that this perceived benefit is possible. In April 2017, Memphis police told a city council committee that BWCs had reduced the number of complaints by 39 percent in one year.<sup>226</sup> The study in Mesa, Arizona found that “officers with body cameras initiated 13.5 percent more interactions with citizens than those who did not wear them,” though it was not determined how many of these

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<sup>222</sup> Ibid.

<sup>223</sup> Wesley G. Jennings, Mathew D. Lynch, and Lorie A. Fridell, “Evaluating the impact of police officer body-worn cameras (BWCs) on response-to-resistance and serious external complaints: Evidence from the Orlando police department (OPD) experience utilizing a randomized controlled experiment,” *Journal of Criminal Justice* 43, no. 6 (2015): 480-486, <http://www.sciencedirect.com/science/article/pii/S0047235215300088>.

<sup>224</sup> Simmons, “Body-mounted Police Cameras: A Primer on Police Accountability vs. Privacy,” 886.

<sup>225</sup> “Considering Police Body Cameras,” 1799-1801; Simmons, “Body-mounted Police Cameras: A Primer on Police Accountability vs. Privacy,” 886.

<sup>226</sup> Greg Coy, “Memphis police body cameras lead to 39-percent drop in complaints,” FOX 29 WFXT, April 12, 2017, <http://www.fox25boston.com/news/police-body-cameras-lead-to-39-percent-drop-in-complaints/511827574>.

interactions were positive or negative.<sup>227</sup> The study also found 40 percent fewer complaints against officers overall, including a 75 percent reduction in use of force complaints.<sup>228</sup> In Orlando, researchers found similar results, with serious external complaints being “significantly less for officers randomly assigned to wear BWCs.”<sup>229</sup> There was an overall 65.4 percent reduction in complaints by the public against department officers.<sup>230</sup> The Rialto study found nearly 10 times fewer citizens’ complaints when BWCs were used than in the 12 months prior to their experimental use.<sup>231</sup> A global study conducted in 2016 further supported these findings and mirrored the Rialto study in particular, reporting that complaints against police officers by the public fell from 1,539 in the 12 months prior to the use of BWCs, or about 1.2 complaints per officer, to 113, or .08 per officer, an overall reduction of 93 percent.<sup>232</sup> The study concluded that “if complaints are a proxy to police (mis)conduct, and if cases of police misconduct predict perceptions of illegitimacy, such a significant, large drop can potentially be interpreted as a technological solution for the legitimacy problem.”<sup>233</sup> The global study added that “in terms of police accountability, BWCs can very well be construed as a ‘fix.’”<sup>234</sup> Thus, in much the same way as the last chapter discussed BWC’s ability to help resolve complaints and incidents between police and the public through an objective, unambiguous view of events, BWCs can also potentially lead to fewer complaints of police officers by the public.

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<sup>227</sup> Justin T. Ready and Jacob T. N. Young, “The impact of on-officer video cameras on police–citizen contacts: Findings from a controlled experiment in Mesa, AZ,” *Journal of Experimental Criminology* 11, no. 3 (2015): 445-458, <https://link.springer.com/article/10.1007/s11292-015-9237-8>.

<sup>228</sup> *Ibid.*

<sup>229</sup> Jennings, Lynch, and Fridell, “Evaluating the impact of police officer body-worn cameras (BWCs) on response-to-resistance and serious external complaints,” 480-486.

<sup>230</sup> *Ibid.*

<sup>231</sup> Farrar, “Operation Candid Camera: Rialto Police Department’s Body-Worn Camera Experiment,” 20–25.

<sup>232</sup> Ariel, et al, “Contagious Accountability,” 301.

<sup>233</sup> *Ibid.*, 303.

<sup>234</sup> *Ibid.*, 304.



A fourth perceived benefit connected to accountability is the promotion of officer safety.<sup>235</sup> As with officers, members of the public may alter their behavior in the presence of BWCs, perhaps decreasing the use of violence or force against an officer.<sup>236</sup> However, there has been little empirical research into the actions by the public and whether BWCs can help to ensure police safety. In fact, Pat Lynch, head of the NYPD's Patrolmen's Benevolent Association (PBA), the largest labor union representing NYPD officers, has cited concerns over the use of BWCs, most especially that the cameras further weigh down officers who already carry a significant amount of equipment.<sup>237</sup> BWCs can also carry potential risks such as an officer being targeted because of the camera, electrical shock, and use of the camera as a weapon by an assailant.<sup>238</sup> Although these concerns are associated with the head-mounted cameras, which are becoming less common in the United States, the risks may still exist, and little empirical evidence has yet determined otherwise.<sup>239</sup>

Finally, increasing transparency may also improve community support for and trust in the police. Greenville, North Carolina Chief of Police Hassan Aden summed up this potential benefit of BWCs when he said: "Cameras have also helped assure the public that an agency is serious about transparency and officer accountability. ... We have found that body-worn cameras can actually help strengthen trust and police legitimacy within the community."<sup>240</sup> Aden cites a case in which a local community

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<sup>235</sup> Simmons, "Body-mounted Police Cameras," 885.

<sup>236</sup> Ibid.

<sup>237</sup> White, *Police Officer Body-Worn Cameras*, 29; Larry Celona, "NYPD in a 'Snap' Judgment: PBA and Brass Resist Order to Carry Cameras," *New York Post*, Aug. 14, 2013, <http://nypost.com/2013/08/14/nypd-in-a-snap-judgment-pba-and-brass-resist-order-to-carry-cameras/>.

<sup>238</sup> White, *Police Officer Body-Worn Cameras*, 29; Goodall, *Guidance for the Police Use of Body-Worn Video Devices*, 28.

<sup>239</sup> White, *Police Officer Body-Worn Cameras*, 29.

<sup>240</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 21.

group accused certain officers of racially profiling individuals during traffic stops.<sup>241</sup>

When the department reviewed the footage, they found that there was a pattern of weak probable cause when making stops, and immediately made several policy and training changes.<sup>242</sup> Soon after, the community group told Aden they were “happy with the outcome [and] appreciated that [the police] had the body-worn camera footage, that the officers’ behavior was investigated, and that [the department] used the video to help us improve.”<sup>243</sup> In this case and others, the increased transparency afforded by BWCs can increase perceptions of police legitimacy and demonstrate to communities that officers are committed to acting in a fair and just manner.<sup>244</sup> Jennifer Benz, a principal research scientist and deputy director of The Associated Press-NORC Center for Academic Research, suggests that BWCs may be a means of beginning to change the historical context of distrust: “There are a lot of divisions in attitudes and experiences [about police], but there is a fair amount of agreement in policies and procedures to reduce tensions in minority communities and to limit violence against civilians.”<sup>245</sup> Matthew Feeney, a policy analyst at Cato Institute, makes a similar claim: “Police body cameras can only be as good as the policies which govern them.”<sup>246</sup> These comments suggest that with the correct policies, BWCs can improve accountability and, as a result, trust with the public.

Both the ACLU and the Minneapolis PCOC have highlighted the importance of maintaining BWCs as a means of providing accountability. The ACLU states “the

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<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> White, *Police Officer Body-Worn Cameras*, 19; Mark W. Clark, “On-Body Video: Eye Witness or Big Brother,” *Police Magazine*, July 8, 2013, <http://www.policemag.com/channel/technology/articles/2013/07/on-body-video-eye-witness-or-big-brother.aspx>.

<sup>245</sup> Autumn A. Arnett, “Experts: Accountability key to change in police behavior,” *Diverse Issues in Higher Education* 32, no. 16 (Sept. 10, 2015): 11, <http://diverseeducation.com/article/77283/>.

<sup>246</sup> Jared Brown, “Body Cameras Increase Police Use of Deadly Force,” *Black Enterprise*, Oct. 11, 2016, <http://www.blackenterprise.com/news/body-cameras-police-deadly-force/>.

challenge of on-officer cameras is the tension between their potential to invade privacy and their strong benefit in promoting police accountability.”<sup>247</sup> Despite the conflicting values of BWCs, the ACLU concluded that with the right policies addressing accuracy, privacy, and access, the cameras can “provide an important protection against police abuse.”<sup>248</sup> The PCOC recommended “that it be made clear in the policy that one of the purposes of body cameras is to promote accountability and increase community trust,” especially because their polling of local communities led to many comments expressing distrust in the police.<sup>249</sup> Thus, despite the concerns associated with body cameras that will be discussed at length below, both the ACLU and PCOC recommend policies that ensure BWCs can achieve accountability and connected perceived benefits, such as building trust between the community and law enforcement. This suggests that the cameras, with the right policies, can be beneficial to all parties and begin solving what many perceive as growing problems in society.<sup>250</sup>

A 2016 study by Temple University found that without strong policies such as those recommended by the ACLU and PCOC requiring accountability, there can be unintended consequences of BWCs.<sup>251</sup> The study by Min-Seok Pang and Paul A. Pavlou found that “[s]urprisingly ... the use of [BWCs] is associated with a 3.64 percent increase in shooting-deaths of civilians by the police.”<sup>252</sup> Pang and Pavlou suggest that the increase can be attributed to the increasing knowledge by officers that BWC footage can

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<sup>247</sup> Jay Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” *American Civil Liberties Union*, March 2015, 2, <https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all>.

<sup>248</sup> *Ibid.*, 9.

<sup>249</sup> “Body Camera Implementation Research and Study,” *Police Conduct Oversight Commission*, September 2015, 30, <http://www.minneapolismn.gov/www/groups/public/@civilrights/documents/webcontent/wcms1p-148199.pdf>.

<sup>250</sup> Stanley, “Police Body-Mounted Cameras,” 9; “Body Camera Implementation Research and Study,” 30.

<sup>251</sup> Randy K. Lippert and Bryce C. Newell, “Introduction: The Privacy and Surveillance Implications of Police Body Cameras,” *Surveillance & Society* 14, no. 1 (2016): 113-116, <http://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/bcdebate-intro>; Min-Seok Pang and Paul A. Pavlou, “Armed with Technology: The Effects on Fatal Shootings of Civilians by the Police,” *Fox School of Business, Temple University*, July 14, 2016, <https://www.bja.gov/bwc/pdfs/SSRN-id2808662.pdf>.

<sup>252</sup> *Ibid.*

be used to justify the shooting, making an officer “less reluctant to use deadly force” because adequate accountability measures are not in place.<sup>253</sup>

However, it is not as simple as relying on BWC cameras to provide greater accountability for law enforcement. Mateescu, Rosenblat, and boyd ask “If accountability is [a] primary justification for camera adoption, how should individual and social costs be weighed and assessed in relation to the unknown benefits?”<sup>254</sup> Some critics of BWCs have argued that body cameras are not a sufficient accountability measure and could, instead, negatively impact community policing. For example, if BWCs “ultimately lead mostly to increased government surveillance, the public’s trust may instead be undermined.”<sup>255</sup> Perhaps McKenzie Funk of *The New York Times Magazine* puts it best when he wrote “Seattle has yet to agree on its answer to the simple question about bodycams: Whom do they serve?”<sup>256</sup> As a result, it is next necessary to consider the potential limitations, concerns, and harms related to BWCs, following the theoretical framework of this paper that suggests it is necessary to balance the potential ideals and perceived benefits of the press or BWCs with reliability/accuracy, privacy, and costs.

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<sup>253</sup> Ibid.

<sup>254</sup> Alexandra Mateescu, Alex Rosenblat, and danah boyd, “Dreams of Accountability,” 122-127.

<sup>255</sup> “Considering Police Body Cameras,” 1803.

<sup>256</sup> McKenzie Funk, “Should We See Everything a Cop Sees,” *New York Times Magazine*, Oct. 18, 2016, [https://www.nytimes.com/2016/10/23/magazine/police-body-cameras.html?\\_r=1](https://www.nytimes.com/2016/10/23/magazine/police-body-cameras.html?_r=1).

### Reliability, Accuracy, & Interpretation

A major limitation of BWCs involves issues of reliability and accuracy of video footage, as well as the potential for different interpretations of it. In much the same way as the press must consider accuracy, so too must it be considered in relation to BWCs.<sup>257</sup> Despite the “perceived ‘objectivity’ of video evidence,” the reliability of the footage remains a fundamental concern of BWCs.<sup>258</sup> Often video purports to provide certainty, but that is not always the case, for several reasons.<sup>259</sup> The footage of the Rodney King beating will provide a case study for the limitations of video footage, despite claims of truth and accountability.

First, the reliability of BWCs is called into question when departments adopt policies giving discretion to police officers, specifically when the cameras should be turned on or off.<sup>260</sup> One approach is often referred to as “continuous recording” or “mandatory reporting,” which requires an officer to turn on the camera at the beginning of his or her shift and turn it off when the shift is over.<sup>261</sup> Similar requests compel an officer to record every encounter with the public, even during informal conversations.<sup>262</sup> Supporters of this approach argue that continuous recording would eliminate the possibility of an officer purposely avoiding recording situations of misconduct or uses of force.<sup>263</sup> Additionally, mandatory recording would protect an officer from allegations of

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<sup>257</sup> Schramm, *Responsibility on Mass Communication*, 218.

<sup>258</sup> “Considering Police Body Cameras,” 1812-1813.

<sup>259</sup> Ibid.

<sup>260</sup> Emmeline Taylor, “Lights, Camera, Redaction... Police Body-Worn Cameras; Autonomy, Discretion and Accountability,” *Surveillance & Society* 14, no. 1 (2016): 128-132, <http://ojs.library.queensu.ca/index.php/surveillance-and-society/index>.

<sup>261</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 3.

<sup>262</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 12.

<sup>263</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 3-4.

discretionary recording.<sup>264</sup> Supporters of continuous recording also contend that officers should record all interactions with the public because it is never known whether a situation may escalate.<sup>265</sup> However, this approach raises issues of privacy, mass surveillance, and financial costs, which will be discussed in the following chapters.

Alternatively, departmental policies can define when officers are required to activate their cameras, including “when responding to calls for service and during law enforcement-related encounters and activities, such as traffic stops, arrests, searches, interrogations, and pursuits.”<sup>266</sup> This approach relies on departments or lawmakers to institute strong, specific policies or frameworks to ensure officers know when to turn on and off their cameras, a recommendation called for by the ACLU and PCOC.<sup>267</sup> The public and these organizations also demand greater consequences for violating these policies, such as if the camera is off at the time of an incident.<sup>268</sup>

Nevertheless, no matter how strict or specific the policies, this approach relies on officers to make the decision to turn on or off the cameras. There have been several situations in which BWCs were not activated during an incident between the police and the public, whether on purpose or not. In the case of the shooting of Terrence Sterling, an unarmed 31-year-old black man who was fatally shot in Washington, D.C., none of the

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<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 13; Kimberly Kindy and Julie Tate, “Police Withhold Videos Despite Vows of Transparency,” *Washington Post* Oct. 8, 2015, <http://www.washingtonpost.com/sf/national/2015/10/08/police-withhold-videos-despite-vows-of-transparency/>.

<sup>267</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 4; “Body Camera Implementation Research and Study,” 7-8; Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 12; Matt Stroud, “The Big Problem with Police Body Cameras,” *Bloomberg*, Jan. 15, 2015, <http://www.bloomberg.com/news/articles/2015-01-15/police-body-camera-policies-wont-work-if-cops-dont-turn-cameras-on>.

<sup>268</sup> Robinson Meyer, “Body Cameras Are Betraying Their Promise,” *The Atlantic*, Sept. 30, 2016, [https://www.theatlantic.com/technology/archive/2016/09/body-cameras-are-just-making-police-departments-more-powerful/502421/?utm\\_source=nl-politics-daily-093016](https://www.theatlantic.com/technology/archive/2016/09/body-cameras-are-just-making-police-departments-more-powerful/502421/?utm_source=nl-politics-daily-093016).

BWCs at the scene were activated until after the shots were fired.<sup>269</sup> The same occurred in several other cases as well, including that of Paul O’Neal, discussed earlier in this paper.<sup>270</sup> In Phoenix, a report on BWCs found that only 13.2 to 42.2 percent of incidents were recorded.<sup>271</sup> Similarly, a report by Denver’s Office of the Independent Monitor found numerous incidents where officers punched or used stun guns on suspects that were not recorded; less than half of the 45 use-of-force incidents were recorded because the cameras were either turned off or experienced technical problems.<sup>272</sup> Whether intentionally or not, the BWCs did not capture the footage that would allow them to an instrument of the search for truth or an accountability measure.

Police discretion and autonomy further calls into question the reliability of the footage because officers often can review footage before filing their reports, while witnesses do not have the same access to the video.<sup>273</sup> Law enforcement officials have argued that access allows officers to recall the events more clearly before making a statement, something that was allowed by police departments with other forms of evidence.<sup>274</sup> On the other hand, some argue that this kind of policy “subverts the egalitarianism that body cameras are supposed to ensure” as officers are able to strengthen their own version of events by seeing the footage before it is made public.<sup>275</sup> Many fear this gives officers or administrators the ability to edit or manipulate the

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<sup>269</sup> Meyer, “Body Cameras Are Betraying Their Promise”; Farhad Manjoo, “Police Cameras Can Shed Light, but Raise Privacy Concerns,” *New York Times*, Aug. 20, 2014, <http://www.nytimes.com/2014/08/21/technology/personaltech/police-cameras-can-shed-light-but-raise-privacy-concerns.html>.

<sup>270</sup> Meyer, “Body Cameras Are Betraying Their Promise.”

<sup>271</sup> Taylor, “Lights, camera, redaction... police body-worn cameras: Autonomy, discretion and accountability”; Charles M. Katz, David E. Choate, Justin R. Ready and Lidia Nuño, *Evaluating the impact of officer worn body cameras in the Phoenix Police Department* (Phoenix, AZ: Center for Violence Prevention & Community Safety, Arizona State University, 2014), 4-41, [https://publicservice.asu.edu/sites/default/files/ppd\\_spi\\_feb\\_20\\_2015\\_final.pdf](https://publicservice.asu.edu/sites/default/files/ppd_spi_feb_20_2015_final.pdf).

<sup>272</sup> Nicholas E. Mitchell, “2014 Annual Report,” *Denver Office of the Independent Monitor*, 2014, [http://extras.denverpost.com/Denver\\_Monitor\\_2014\\_Annual\\_Report.pdf](http://extras.denverpost.com/Denver_Monitor_2014_Annual_Report.pdf).

<sup>273</sup> Meyer, “Body Cameras Are Betraying Their Promise.”

<sup>274</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 16.

<sup>275</sup> Meyer, “Body Cameras Are Betraying Their Promise.”

footage.<sup>276</sup> In a study conducted by the Madison (Wisconsin) Center for Family Policy and Practice, an advocacy group for low-income minority individuals and families, one participant said “I’m pretty skeptical, because we do live in a pretty technologically inclined era ... [the footage] can be easily manipulated. They can definitely get away with something or brush something under the rug.”<sup>277</sup> The accuracy of footage becomes increasingly questionable because it is often difficult, if not impossible, to tell whether footage has been altered or not, especially because some edits, such as blurred faces, are allowed by department policy.<sup>278</sup>

Other concerns also demonstrate the limitations of BWC footage reliability and accuracy. One question is what is missing from the footage. In some cases, the camera may not record everything taking place at the scene. The camera may be angled away from the action, such as if an officer turns and faces a different direction.<sup>279</sup> The view of the camera may also be obstructed by an object or person at the scene.<sup>280</sup> Technological problems can also arise, such as when the lapel pins securing the cameras to officers were dislodged during the struggle to subdue Alton Sterling in Baton Rouge, Louisiana.<sup>281</sup> Or if the camera is not focused properly or is too far away to record something

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<sup>276</sup> David Ingram, “California shooting shows slow adoption of police body cameras,” *Reuters*, Sept. 29, 2016, <http://www.reuters.com/article/us-usa-police-cameras-idUSKCN11Z2QK>; “Body-Worn Video for the Madison Police Department Community Engagement Sessions,” *Center for Family Policy & Practice*, Aug. 25, 2015, [http://cffpp.org/wp-content/uploads/2016/06/CFPP-YWCA\\_Body-Worn\\_Video\\_Report.pdf](http://cffpp.org/wp-content/uploads/2016/06/CFPP-YWCA_Body-Worn_Video_Report.pdf).

<sup>277</sup> “Body-Worn Video for the Madison Police Department Community Engagement Sessions,” *Center for Family Policy & Practice*, Aug. 25, 2015, [http://cffpp.org/wp-content/uploads/2016/06/CFPP-YWCA\\_Body-Worn\\_Video\\_Report.pdf](http://cffpp.org/wp-content/uploads/2016/06/CFPP-YWCA_Body-Worn_Video_Report.pdf).

<sup>278</sup> Alexis Sobel Fitts, “It’s Almost Impossible To Tell If Police Camera Footage Has Been Edited,” *Huffington Post*, Aug. 7, 2015, [http://www.huffingtonpost.com/entry/fake-police-cam-footage\\_us\\_55c23782e4b0f7f0bebb2b5c](http://www.huffingtonpost.com/entry/fake-police-cam-footage_us_55c23782e4b0f7f0bebb2b5c); Rebecca Parr, “Body Camera Lawsuit Could Set Precedent on Edited Footage,” *The Daily Review*, March 18, 2016, <http://www.govtech.com/public-safety/Body-Camera-Lawsuit-Could-Set-Precedent-on-Edited-Footage.html>.

<sup>279</sup> Kindy and Tate, “Police Withhold Videos Despite Vows of Transparency.”

<sup>280</sup> Timothy Williams, James Thomas, Samuel Jacoby, and Damien Cave, “Police Body Cameras: What Do You See,” *New York Times*, April 1, 2016, [http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?\\_r=2](http://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html?_r=2).

<sup>281</sup> Dan Frosch and Valerie Bauerlein, “Louisiana Shooting Highlights Body Camera Issues,” *Wall Street Journal*, July 7, 2016, <http://www.wsj.com/articles/louisiana-shooting-highlights-body-camera-issues-1467943690>; Shay Arthur and Eryn Taylor, “Police body cameras not foolproof,” *WREG News Channel 3*, July 6, 2016, <http://wreg.com/2016/07/06/police-body-cameras-not-foolproof/>.



definitively.<sup>282</sup> This was the case in an El Cajon, California incident on September 27, 2016 when police responded to a call for emergency psychiatric aid for 38-year-old Alfred Olango.<sup>283</sup> The images from the scene were not clear enough to see whether Olango was holding anything before being shot and killed by police.<sup>284</sup> A vape smoking device, not a gun, was later recovered from the scene.<sup>285</sup> Concerns over lighting, lens clarity, movement, and battery life have also been cited in relation to BWCs.<sup>286</sup>

A final concern related to the reliability and accuracy of BWC footage is the subjective interpretation required in watching and listening to the footage. In his dissent in the 2007 Supreme Court case *Scott v. Harris*, Justice John Paul Stevens disagreed that video of a police chase “speak[s] for itself,” but argued instead that the video was open to multiple interpretations.<sup>287</sup> This same issue was explored in a context more closely related to body cameras in an interactive *New York Times* article titled “Police Body Cameras: What Do You See,” which included several videos and asked the reader to answer questions interpreting what was happening in the video clips.<sup>288</sup> Seth W. Stoughton, a law professor at the University of South Carolina, was quoted throughout the story about the limitations of BWCs. First, he explained that the same scene shot from a different point of view will result in different interpretations of the same incident.<sup>289</sup> Second, Stoughton contended that “deceptive intensity” can occur when watching body camera footage.<sup>290</sup> In a struggle with a suspect, the camera mounted on the officer’s chest produces “herky-jerky movements that exaggerate what’s going on,” making it seem like

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<sup>282</sup> Ingram, “California shooting shows slow adoption of police body cameras.”

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> Scheindlin, “Will the widespread use of body cameras improve police accountability? Yes,” 24-27; Taylor, “Lights, Camera, Redaction,” 128-132.

<sup>287</sup> *Scott*, 550 U.S. 372; Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 1-19.

<sup>288</sup> Williams, Thomas, Jacoby, and Cave, “Police Body Cameras: What Do You See?”

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

the interaction is more intense than it actually is.<sup>291</sup> Third, Stoughton demonstrated that the most pressing questions are not always answered in the footage, such as whether a suspect had a gun or not.<sup>292</sup> Fourth, Stoughton described the psychological phenomenon known as “camera perspective bias.”<sup>293</sup> When we see a video as if looking through someone’s eyes, there is a tendency to adopt an interpretation favoring that person.<sup>294</sup> Because the placement of BWCs makes it seem as if we are looking through the officer’s eyes, we are more likely to interpret the footage in defense of that officer.<sup>295</sup> Finally, individuals’ biases and what they already believe can also affect their interpretation of the footage.<sup>296</sup> For example, people who say they generally trust the police are more likely to see a threat against them as being more serious, as compared to people who do not trust the police and believe it is a less serious threat.<sup>297</sup> Biases about race can also affect how people interpret the BWC footage.<sup>298</sup> In short, people who already disagree about policing will also disagree about what is seen in the footage.<sup>299</sup> Furthermore, communities, like individuals, can impose their own beliefs and biases on BWC footage.<sup>300</sup> BWCs “will enter into a social system involving courts, police departments and civil rights organizations that already are at loggerheads about the interpretation of police actions. As these communities endeavor to make a video ‘speak for itself,’ they will inevitably speak for it, imposing competing interpretations.”<sup>301</sup>

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<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

<sup>299</sup> Ibid.

<sup>300</sup> Janet Vertesi, “The Problem With Police Body Cameras,” *Time*, May 4, 2015, <http://time.com/3843157/the-problem-with-police-body-cameras/>.

<sup>301</sup> Ibid.

The case of Rodney King, particularly the famous footage taken by a bystander, provides a case study for the tension between truth and accountability with reliability and accuracy. On one hand, newspaper accounts and arguments by prosecutors during the judicial process suggested that footage could be used as a means of finding the truth of what happened. The prosecutor in the federal case, Steven D. Clymer, repeatedly replayed the videotape of the beating, calling it “the most unbiased witness of the March 3, 1991 beating.”<sup>302</sup> Also, while gesturing with a battered black metal police baton to the jury, he claimed it provided the truth about King’s character, rather than the contentions by the defense that he was aggressive or combative.<sup>303</sup> In the trial on state charges, the prosecutor, Terry White, told the jury “Without the videotape, we wouldn’t be here ... Who would be here is Rodney King, and he would be facing the false accusations of Stacey Koon, and he’d be facing the false accusations of Laurence Powell.”<sup>304</sup> Both Clymer and White suggested that camera footage can provide a more accurate, objective account than testimony by police officers, a similar claim that can be made about BWCs.

Events and commentary following the Rodney King trials suggested that the bystander footage could also provide accountability of law enforcement. After the footage was seen nationwide and created such outrage, a commission was established to avoid future events like the beating; a new police chief, the first black police chief in Los Angeles’ history, was appointed; and propositions to reform the Los Angeles Police Department were introduced.<sup>305</sup> Many agencies incorporated a dash camera as standard equipment on patrol cars.<sup>306</sup> Additionally, more than 25 civil rights activists and

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<sup>302</sup> Seth Mydans, “Prosecutor in King Beating Tells Jury to Focus on Tape,” *New York Times*, April 9, 1993, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/109201584?accountid=14586>.

<sup>303</sup> Ibid.

<sup>304</sup> Lynne C. Shifflett, “Trial Testimony Ends: The Tape Tells the Tale,” *Los Angeles Sentinel*, April 23, 1992, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/565634323?accountid=14586>.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

community groups founded the Coalition for Police Accountability to improve public oversight after the Rodney King beating.<sup>307</sup> Newspaper stories at the time explicitly discussed calls for greater accountability stemming from the footage. In “A City Running Out Of Accountability,” the *Los Angeles Times* on March 24, 1991, three weeks after the beating, said “The principle of accountability must be reclaimed.”<sup>308</sup> In a December 31, 1991 *Los Angeles Times* story, City Councilman Mark Ridley-Thomas, described as a leading voice for police reform, was quoted as saying ““The overall objective is effective law enforcement and police accountability. And until we have police accountability, we will not have the kind of effective law enforcement that we deserve.””

However, concerns about the accuracy and interpretation of the footage were also raised in addition to the claims of truth and accountability. In a February 14, 1993 *Los Angeles Times* story, writer Jim Newton discussed several enhancements of the video by the FBI, including slowing down the tape, stabilizing the picture, and experimental exposures.<sup>309</sup> Newton wrote that “some experts are questioning the way that evidence will be presented and warning that it could alter jurors’ perceptions in significant ways.”<sup>310</sup> Newton quoted Brian Stonehill, founder of the media studies department at Pomona College, who said, “What’s happening here is that jurors are relying on a tape that distorts the event ... What they are seeing is not what happened.”<sup>311</sup> One particular enhancement discussed was the use of slow motion, which then-psychology professor

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<sup>307</sup> Julio Moran, “1st Anniversary of King Beating Prompts Coalition to Call for Police Reform,” *Los Angeles Times*, March 3, 1992,

<http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/1723114278?accountid=14586>.

<sup>308</sup> “A City Running Out of Accountability,” *Los Angeles Times*, March 24, 1991,

<http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/1638544760?accountid=14586>.

<sup>309</sup> Jim Newton, “King Video Enhancement Blurs Reality, Experts Say,” *Los Angeles Times*, Feb. 14, 1993, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/1851872094?accountid=14586>.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

Patricia Greenfield said “can make an event look quite different.”<sup>312</sup> Then-USC professor and documentarian Joe Saltzman said “all videotape is inaccurate,” citing lighting, camera angle, video speed, and more.<sup>313</sup> In a retrospective story, the *Washington Post* echoed these concerns, saying “[the footage], in its own way, distorted the truth.”<sup>314</sup>

Newspaper articles also discussed the concerns over different interpretations of the footage. The *Washington Post* suggested that the jury saw things differently than many people who were outraged by the jury’s decision:

The vivid and emotional recollections of the participants were overshadowed by the observations of an uncompromising and emotionless witness, the famous videotape of the beating. ... [T]he severe limitations of the picture [led to] ... widespread shock and outrage when a jury in Simi Valley, Calif., saw things differently.<sup>315</sup>

An August 5, 1993 *New York Times* echoed the concern that the footage would lend itself to different interpretations, saying “the shocking but enigmatic videotape ... seem[ed] to tell different stories to different audiences.”<sup>316</sup> Finally, in his *Los Angeles Times* story, Newton wrote “Few who have seen Holliday’s videotape have been able to resist drawing their own conclusions, regardless of what other evidence emerges about the arrest ... because video images are so influential.”<sup>317</sup> As a result, questions over accuracy and interpretation raised concerns about whether the footage was an effective piece of evidence, or whether it had negative impacts on the jury or any American who viewed it.

Ultimately, the controversy over the Rodney King beating footage represents the same balancing that is necessary with BWCs: truth and accountability versus concerns associated with the reliability and accuracy of the footage.

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<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

<sup>314</sup> Lou Cannon, “The King Incident: More than Met the Eye on Videotape,” *Washington Post*, Jan. 25, 1998, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/1620011435?accountid=14586>.

<sup>315</sup> Ibid.

<sup>316</sup> Seth Mydans, “Sympathetic Judge Gives Officers 2 1/2 Years in Rodney King Beating,” *New York Times*, Aug. 5, 1993, <http://login.ezproxy.lib.umn.edu/login?url=http://search.proquest.com/docview/109017766?accountid=14586>.

<sup>317</sup> Newton, “King Video Enhancement Blurs Reality, Experts Say.”

## Privacy

On December 15, 1890, lawyers Samuel Warren and Louis Brandeis published “The Right to Privacy” in the *Harvard Law Review*.<sup>318</sup> The essay is generally credited as being the first to advocate recognition of a legal right to privacy in the United States and laid the foundation for privacy rights for over a century.<sup>319</sup> Warren and Brandeis wrote:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. ... [Privacy law exists] to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds.<sup>320</sup>

Over 130 years later, BWCs represent a “modern device” that raises these concerns by Warren and Brandeis as being potentially invasive to the privacy of an individual. Like critics of BWCs today, Warren and Brandeis were concerned about “‘recent inventions and business methods’ such as ‘instantaneous photographs ... and numerous mechanical devices’ threaten[ing] to collect and disseminate personal information about individuals to the world at large.”<sup>321</sup>

Thus, weighed against the ideals of how BWCs ought to operate is individuals’ privacy rights, echoing the concerns first introduced by Warren and Brandeis. This section will discuss the privacy concerns associated with BWCs before then discussing how (1) state laws, (2) city or departmental policies, (3) the Fourth Amendment, and (4) court precedent address privacy concerns raised by the use of BWCs.

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<sup>318</sup> Louis Brandeis and Samuel Warren, “The Right to Privacy,” *Harvard Law Review* 4, no. 5 (1890), [http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy\\_brand\\_warr2.html](http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html).

<sup>319</sup> Dorothy J. Glancy, “The Invention of the Right to Privacy,” *Arizona Law Review* 21, no. 1 (1979): 1-2, <http://law.scu.edu/wp-content/uploads/Privacy.pdf>.

<sup>320</sup> Brandeis and Warren, “The Right to Privacy.”

<sup>321</sup> *Ibid.*

First, because BWCs record everything in view, both video and audio, they potentially can record sensitive materials or situations.<sup>322</sup> This means the camera could “capture in real time the traumatic experiences of citizens who are victims of a crime, those who are involved in medical emergencies and accidents, or those who are being detained or arrested.”<sup>323</sup> These situations are often highly emotional and personal, especially in cases of domestic violence or sexual assault.<sup>324</sup> These concerns are augmented because a victim’s trauma may be intensified by the presence of the camera, especially if the footage is later released to the public.<sup>325</sup>

Second, BWCs can capture footage of private places or areas generally recognized as being off-limits to the general public. Police officers often enter private homes, for example, in the execution of a warrant or other reasons, an area where an individual generally has an expectation of privacy.<sup>326</sup> Officers may also be called to scenes that require entering hospitals or schools, areas that raise additional privacy concerns.<sup>327</sup> In hospitals, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires health providers to keep patients’ health information secure.<sup>328</sup> Schools are another place raising additional privacy concerns, when the footage of students

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<sup>322</sup> White, *Police Officer Body-Worn Cameras*, 46-47.

<sup>323</sup> *Ibid.*, 7.

<sup>324</sup> Richard Lin, “Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns,” *Duke Law & Technology Review* 14, (2016): 346-365, <http://scholarship.law.duke.edu/dltr/vol14/iss1/15/>; Henderson, “Fourth Amendment Time Machines,” 960; Mateescu, Rosenblat, and boyd, “Dreams of Accountability,” 122-127.

<sup>325</sup> Kampfe, “Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Police Department Action,” 1170.

<sup>326</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 11; Lin, “Police Body Worn Cameras And Privacy,” 346-365; Dru S. Letourneau, “Police Body Cameras: Implementation with Caution, Forethought, and Policy,” *Richmond Law Review* (2015): 439-475, <http://lawreview.richmond.edu/wp/wp-content/uploads/2016/02/Letourneau-501.pdf>; Henderson, “Fourth Amendment Time Machines,” 960.

<sup>327</sup> Brandon Goldner, “Police body cameras clash with medical privacy laws,” *WNCT* 9, Nov. 6, 2015, <http://wnct.com/2015/11/06/police-body-cameras-clash-with-medical-privacy-laws/>; Evie Blad, “Body Cameras on School Police Spark Student Privacy Concerns,” *Education Week*, March 4, 2015, <http://go.galegroup.com/ps/i.do?p=PROF&sw=w&u=mnaumntwin&v=2.1&it=r&id=GALE%7CA405512590&asid=a7ec8a0fcd166bd8f476e79c770953a2>.

<sup>328</sup> Goldner, “Police body cameras clash with medical privacy laws”; Blad, “Body Cameras on School Police Spark Student Privacy Concerns.”

fighting or simply making mistakes could become part of a digital footprint and affect their reputation.<sup>329</sup>

Third, police discretion to turn cameras on and off goes to the heart of privacy interests.<sup>330</sup> Policies requiring continuous recording particularly raise privacy concerns because BWCs are most likely to capture sensitive information or private places.<sup>331</sup> Officers are not given the ability to turn off the BWC, even in situations with heightened privacy concerns.<sup>332</sup> Even if continuous recording is avoided, the absence of strict policies determining when an officer should turn off their BWC may lead to an officer having to determine himself or herself whether privacy rights will be invaded.<sup>333</sup>

Fourth, concerns over privacy rights of individuals, including witnesses and confidential informants, have been connected to a potential chilling effect.<sup>334</sup> Witnesses, informants, and other people not directly involved in the incident may be less willing to speak to and provide information to the police if they know they are being recorded and that the video may be viewed by others later.<sup>335</sup>

Fifth, privacy concerns are associated with the storage of BWC footage, and the subsequent vulnerability of stored video to hacking attempts, especially if the department uses cloud-based storage.<sup>336</sup> In December 2014, the Seattle Police held a “Hackathon” designed to have people figure out ways to more quickly and efficiently “redact or

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<sup>329</sup> Blad, “Body Cameras on School Police Spark Student Privacy Concerns.”

<sup>330</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 11-12; Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All.”

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> White, *Police Officer Body-Worn Cameras*, 21; David A. Harris, “Picture This: Body Worn Video Devices (‘Head Cams’) as Tools for Ensuring Fourth Amendment Compliance by Police,” *Pitt Law Legal Studies Research Paper Series* (2010): 1-19, <https://www.nlg-npap.org/sites/default/files/Harris-Video.pdf>; Letourneau, “Police Body Cameras: Implementation with Caution, Forethought, and Policy.”

<sup>335</sup> *Ibid.*

<sup>336</sup> John Vibes, “Seattle Police Hold Hacking Contest So They Can Learn How To Censor Body-Cam Footage,” *The Free Thought Project*, accessed March 7, 2017, <http://all-len-all.com/seattle-police-hold-hacking-contest-so-they-can-learn-how-to-censor-body-cam-footage/>.



remove faces and voices from those [BWC] recordings to protect the identities of victims, witnesses, and juveniles.”<sup>337</sup> Although the event was designed to find a way to speed up this process and save police resources, it also demonstrated the potential vulnerability of stored footage because officers would have the power to alter the footage, in much the same way as the “Hackathon” participants had.<sup>338</sup> The concern highlights a broader fear related to security of digital content in light of increased hacking, including to the 2016-Democratic National Committee email leak and more.<sup>339</sup>

Finally, the increased use of BWCs raises concerns of the potential proliferation of surveillance, seen by some as representing a step towards a surveillance state.<sup>340</sup> Because BWCs capture close-up images and may be subjected to facial recognition technology, an individual already in a database could be identified, such a former convict.<sup>341</sup> Additionally, limitations of blurring software make it possible for individuals in the footage to be identified or for faces to be overlooked in order to ensure essential elements are not blurred out.<sup>342</sup> Perhaps even more concerning, BWCs add more camera surveillance into society, therefore making it increasingly possible for government or companies to track citizens’ everyday movements.<sup>343</sup> Facial recognition software used in conjunction with BWCs could pose a threat to civilian privacy, possibly leading to the creation of a comprehensive database of individuals.<sup>344</sup> Vulnerable populations such as

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<sup>337</sup> Jonah Spangenthal-Lee, “Sign Up Now For the First-Ever Seattle Police Hackathon,” *Seattle Crime News SPD Blotter*, Dec. 5, 2014, <http://spdblotter.seattle.gov/2014/12/05/sign-up-now-for-the-first-ever-seattle-police-hackathon/>.

<sup>338</sup> Ibid.

<sup>339</sup> Elizabeth Weise, “Trump’s Twitter profile sparks new risk,” *USA Today*, Jan. 26, 2017, <http://www.usatoday.com/story/tech/news/2017/01/26/trump-phone-android-secure-tweet/97096586/>.

<sup>340</sup> “Considering Police Body Cameras,” 1810.

<sup>341</sup> Ibid.

<sup>342</sup> Mateescu, Rosenblat, and boyd, “Dreams of Accountability,” 122-127.

<sup>343</sup> Lin, “Police Body Worn Cameras And Privacy,” 353-355.

<sup>344</sup> “Considering Police Body Cameras,” 1794-1817; Mateescu, Rosenblat, and boyd, “Dreams of Accountability,” 122-127; Clare Garvie, Alvaro Bedoya, and Jonathan Frankle, “The Perpetual Line-Up: Unregulated Police Face Recognition in America,” *Georgetown Law Center of Privacy & Technology*, Oct. 18, 2016, <https://www.perpetuallineup.org/>.

homeless individuals, undocumented migrants, crime victims, and minority populations may be at the greatest risk of surveillance and privacy invasion.<sup>345</sup> In other words, the cameras have the potential to harm the individuals and groups they are meant to help.<sup>346</sup>

Officers' privacy can also be affected by BWCs, especially if continuous recording is adopted.<sup>347</sup> After *Floyd v. City of New York*, initial responses to the implementation of BWCs were almost universally negative for several reasons related to officers' privacy.<sup>348</sup> Police officers in a northern suburb of Chicago, Round Lake Park, sued the village for invasion of privacy, claiming that the cameras had recorded them in the bathroom as well as other private situations like changing their clothes.<sup>349</sup> The officers contended that the cameras continued recording, even if they had turned them off.<sup>350</sup> Additionally, depending on departmental policies of storing footage, every action taken by an officer on duty could become a matter of permanent record.<sup>351</sup> In response to these concerns, departments or unions, such as in Rialto, California and Mesa, Arizona, created groups meant to help manage the implementation of BWCs and ensure that officer privacy is recognized and addressed.<sup>352</sup>

Different laws, policies, and court precedent address the privacy concerns raised by BWCs. In the 1967 Supreme Court case *Katz v. United States*, Justice John Marshall Harlan wrote a concurring opinion, which outlined what it means to have a "reasonable expectation of privacy."<sup>353</sup> Justice Harlan outlined a two-part requirement for this rule:

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<sup>345</sup> Ibid.

<sup>346</sup> Mateescu, Rosenblat, and boyd, "Dreams of Accountability," 122-127.

<sup>347</sup> Stanley, "Police Body-Mounted Cameras: With Right Policies In Place, A Win For All," 3.

<sup>348</sup> White, *Police Officer Body-Worn Cameras*, 28.

<sup>349</sup> Robert McCoppin, "Round Lake Park cops sue village over body camera bathroom videos," *Chicago Tribune*, June 24, 2016, <http://www.chicagotribune.com/news/local/breaking/ct-round-lake-park-police-camera-suit-met-20160624-story.html>; The Associated Press, "Police body cameras raise privacy concerns."

<sup>350</sup> McCoppin, "Round Lake Park cops sue village over body camera bathroom videos."

<sup>351</sup> "Debate over Ferguson police body cameras: breach of privacy questioned."

<sup>352</sup> White, *Police Officer Body-Worn Cameras*, 29.

<sup>353</sup> *Katz v. United States*, 389 U.S. 347 (1967); Lin, "Police Body Worn Cameras and Privacy," 346-365.

“first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>354</sup> Justice Harlan concluded that

a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected,’ because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.<sup>355</sup>

The phrase “reasonable expectation of privacy” was subsequently used in several state laws and local police policies.<sup>356</sup> Justice Harlan’s concurrence also suggested that there are situations, such as the “plain view” exception, in which an individual’s privacy rights would not be violated, even in a private place.<sup>357</sup>

The Reporters Committee for Freedom of the Press (RCFP) has summarized some general rules regarding recording. Even well-known public figures, when speaking in their homes or other private retreats or places, have a reasonable expectation of privacy.<sup>358</sup> In public, generally people must assume they may be recorded or photographed, especially if they are officials carrying out their public duties.<sup>359</sup> As a result, an individual may

photograph, film and record what you can easily see or hear in public places, even if the recorded people have not specifically consented to such, provided you do not harass, trespass or otherwise intrude. This includes shooting footage of a private property from a public sidewalk, as long as you do not engage in overzealous surveillance.<sup>360</sup>

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<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

<sup>356</sup> Lin, “Police Body Worn Cameras and Privacy: Retaining Benefits While Reducing Public Concerns,” 353.

<sup>357</sup> Ibid.

<sup>358</sup> “The legal limits of recording conduct and conversations,” *Reporter’s Committee For Freedom Of The Press*, accessed March 7, 2017, <http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/legal-limits-recording-conduct-and-conver>.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

Next, several different categories/types of state laws can be applicable, either directly or indirectly, to BWCs. First, each state requires either one-party consent, two-party consent, or all-party consent to permit recording of a conversation.<sup>361</sup> Thirty-eight states and the District of Columbia have one-party consent statutes, allowing individuals to record conversations in which they participate without informing the other members of the conversation that they are doing so.<sup>362</sup> Twelve states have all-party consent statutes, which require the consent of all parties in a conversation, under most circumstances.<sup>363</sup> However, several of these states have exceptions for law enforcement.<sup>364</sup> One example is Florida, which allows one-party consent “if an investigative or law enforcement officer intercepts a communication while a party to the communication, or when the purpose of interception is to obtain evidence of a criminal act.”<sup>365</sup> Georgia similarly requires all-party consent except in the case of law enforcement, as long as the interception occurs legally and in the course of official duties.<sup>366</sup>

Second, 30 states specifically prohibit audio recording in certain situations, such as when an individual or group is unaware of being recorded.<sup>367</sup> For example, Colorado state law prohibits eavesdropping, intentionally recording or overhearing a conversation by an individual who is not visibly present.<sup>368</sup> However, some states allow, or at least do not prohibit, video recordings of an individual without his or her knowledge or consent,

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<sup>361</sup> “State-by-State Recording Laws,” *MSI Detective Services*, accessed March 7, 2017, <http://www.detectiveservices.com/2012/02/state-by-state-recording-laws/>; Nancy G. La Vigne, Margaret Ulle, Tim Meko, Ben Chartoff, Fiona Blackshaw, and Dan Matos, “Police Body-Worn Camera Legislation Tracker,” *Urban Institute*, January 2017, <http://apps-staging.urban.org/features/body-camera-update/>; Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 14; White, *Police Officer Body-Worn Cameras*, 27.

<sup>362</sup> “State-by-State Recording Laws”; La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>363</sup> *Ibid.*

<sup>364</sup> Letourneau, “Police Body Cameras: Implementation with Caution, Forethought, and Policy,” 455; Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 17; La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>365</sup> Fla. Stat. § 934.03(2)(a)3(c) (2016); La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>366</sup> Ga. Code Ann. § 16-11-62(2)(C) (2015); La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>367</sup> La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>368</sup> Del. Code Ann. tit. 11 § 2402(c) (2017); La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

as long as there is no audio recording.<sup>369</sup> Florida, for example, restricts only interception of “oral communications.”<sup>370</sup> This suggests that video alone may not be restricted.<sup>371</sup>

Another type of state law that could apply to BWCs restricts audio recording in places where privacy is expected. In all but nine states, audio recording of an individual is restricted when he or she has “a reasonable expectation of privacy.”<sup>372</sup> State laws generally “block the warrantless capturing of photo or video images of people where they have an expectation of privacy.”<sup>373</sup>

A fourth type of state law is connected directly to BWCs. The laws in 16 states, including Washington, D.C., dictate when and where body cameras can and cannot be used.<sup>374</sup> Some states have laws that set out specifically when and where cameras are prohibited.<sup>375</sup> In Connecticut, Public Act No. 15-4 forbids BWCs to record

(1) a communication with other law enforcement agency personnel, except that which may be recorded as the officer performs his or her duties, (2) an encounter with an undercover officer or informant, (3) when an officer is on break or is otherwise engaged in a personal activity, (4) a person undergoing a medical or psychological evaluation, procedure or treatment, (5) any person other than a suspect to a crime if an officer is wearing such equipment in a hospital or other medical facility setting, or (6) in a mental health facility, unless responding to a call involving a suspect to a crime who is thought to be present in the facility.<sup>376</sup>

Connecticut is representative of several states’ efforts to decrease some of the privacy concerns related to BWCs through a comprehensive list of situations in which recording is prohibited.

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<sup>369</sup> La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>370</sup> Fla. Stat. § 934.03(2)(a)3(c) (2016); La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>371</sup> Ibid.

<sup>372</sup> La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>373</sup> White, *Police Officer Body-Worn Cameras*, 27; “A Primer on Body-Worn Cameras for Law Enforcement,” *U.S. Department of Justice Office of Justice Programs National Institute for Justice*, September 2012, <https://www.justnet.org/pdf/00-Body-Worn-Cameras-508.pdf>.

<sup>374</sup> La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>375</sup> Ibid.

<sup>376</sup> An Act Concerning Excessive Use of Force Public Act No. 15-4, 2015 Conn. Acts (Spec. Sess.); La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

In other states, statutes or legislation dictate in what situations officers should turn on their cameras. One example is Delaware, where the state adopted as law the Model Policy Guidelines passed by several law enforcement organizations in the state.<sup>377</sup> The guidelines provided that officers must turn on BWCs “when an arrest or detention is likely; when the use of force is likely; or any other incident where the safety of people and property in Delaware is promoted.”<sup>378</sup> The directive also prohibited BWCs from operating during “encounters with undercover officers or confidential informants, and instances where a victim or witness could request the camera be turned off.”<sup>379</sup> States with laws similar to Delaware’s do not allow continuous recording by officers, but instead require that cameras should be turned off in places where there may be an expectation of privacy, such a private home. An Oregon statute goes a step further by requiring an officer to ask for consent to record with a BWC in private places, though there are exceptions, such as if an officer would be in danger, it would impair the criminal investigation, or if asking for consent is not possible.<sup>380</sup> The law, and others like it, are similar to existing one-party or two-party consent laws, but specifically regulate BWCs in an attempt to clearly outline when an officer should use a BWC and when he or she should not. Conversely, Illinois passed a law requiring continuous recording, further attempting to decrease police discretion, though also raising privacy concerns.<sup>381</sup> The enacted legislation requires that BWCs be on “at all times when the officer is in uniform

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<sup>377</sup> Quint Forgey, “Delaware lawmakers introduce police body cams policy,” *The News Journal*, June 29, 2016, <http://www.cincinnati.com/story/news/politics/2016/06/29/delaware-lawmakers-introduce-police-body-cams-policy/86512682/>.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> 2015 Or. Laws Ch. 550 § 2; Or. Rev. Stat. § 165.540(5)(d)(B) (2015); La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

<sup>381</sup> Law Enforcement Officer-Worn Body Camera Act, 50 Ill. Comp. Stat. 706/10-20(a)(3) (2015); La Vigne, et al., “Police Body-Worn Camera Legislation Tracker.”

and is responding to calls ... or engaged in any law enforcement-related encounter or activity” while the officer is on duty.<sup>382</sup>

Finally, 15 states specifically mention privacy in laws addressing public access to BWC footage. For example, in Nevada, the law requires that police deactivate a “portable recording device” in order to “[protect] the privacy of persons: (I) In private residences; (II) Seeking to report a crime or provide information regarding a crime or ongoing investigation anonymously; and (III) Claiming to be a victim of a crime.”<sup>383</sup> In Kansas, the disclosure of footage to the public is limited if the footage is a “clearly unwarranted invasion of personal privacy.”<sup>384</sup>

Although different types of state laws aim to protect the public’s privacy interests in relation to BWCs, city or police departmental policies further address potential privacy concerns of BWCs. First, policies vary widely regarding limits on recording witnesses and victims.<sup>385</sup> Austin, Texas’s policy encourages recording witness and victim interviews, though it is left to police discretion.<sup>386</sup> Conversely, in Charlotte, North Carolina, the policy prohibits any recording of witnesses and victims.<sup>387</sup> Minneapolis represents the middle ground giving an officer discretion to record the witness or victim, but requiring him or her to attempt to gain consent before recording.<sup>388</sup>

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<sup>382</sup> Ibid.

<sup>383</sup> “Access to Police Body-Worn Camera Video,” *Reporters Committee For Freedom of the Press*, accessed March 7, 2017, <https://www.rcfp.org/bodycams>; Nev. Rev. Stat. § 289 (2015).

<sup>384</sup> Kan. Stat. Ann. § 45-217 (2015); “Access to Police Body-Worn Camera Video.”

<sup>385</sup> “Police Body Camera Policies: Privacy and First Amendment Protections,” *Brennan Center for Justice at New York University School of Law*, Aug. 3, 2016, <https://www.brennancenter.org/analysis/police-body-camera-policies-privacy-and-first-amendment-protections>.

<sup>386</sup> “Body Worn Camera Systems,” *Austin Police Department Policy Manual*, May 11, 2016, [https://www.austintexas.gov/sites/default/files/files/Police/APD\\_Body\\_Camera\\_policy\\_2016.pdf](https://www.austintexas.gov/sites/default/files/files/Police/APD_Body_Camera_policy_2016.pdf); “Police Body Camera Policies: Privacy and First Amendment Protections.”

<sup>387</sup> “CMPD Directives,” *Charlotte-Mecklenburg Police Department*, Feb. 2, 2015, [https://rcfp.org/bodycam\\_policies/NC/Charlotte\\_BWC\\_Policy.pdf](https://rcfp.org/bodycam_policies/NC/Charlotte_BWC_Policy.pdf); “Police Body Camera Policies: Privacy and First Amendment Protections.”

<sup>388</sup> Minneapolis Police Department § 4-223.

Second, city or department policies may outline specific situations in which recording is either allowed or restricted. Minneapolis' policy outlines 14 specific situations in which a BWC must be activated, including "traffic stops," "contact involving criminal activity," and more.<sup>389</sup> Conversely, Minneapolis limits recording in eight situations, including in which an undercover officer or confidential informant would be revealed.<sup>390</sup> Minneapolis' policy also says that strip searches may be recorded by audio recording only.<sup>391</sup> Similarly, Charlotte lists several situations where recording is not allowed, including "in bathrooms, locker rooms, or other places where there is an expectation of privacy."<sup>392</sup> The policy continues, "To aid in the protection of the right to privacy, officers shall not record while: in a patient care area ... [i]n a classroom and/or when in a testing environment" as well as other locations such as meetings with attorneys or doctors, public meetings, and more.<sup>393</sup>

A third type of policy is the limiting of recording of First Amendment-protected activity. Minneapolis's policy includes a clause that restricts recording "solely for the purpose of surveillance of, or identification of[,] individuals engaged in constitutionally protected activities conducted in a lawful manner."<sup>394</sup> Seattle's pilot program is one of the strictest, stating that "Unless there is reasonable suspicion to believe that criminal activity is occurring or will occur, employees shall not intentionally record ... people who are lawfully exercising their freedom of speech, press, association, assembly, religion, or the

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<sup>389</sup> Ibid.

<sup>390</sup> Ibid.

<sup>391</sup> Ibid.

<sup>392</sup> "Police Body Camera Policies: Privacy and First Amendment Protections"; "CMPD Directives," *Charlotte-Mecklenburg Police Department*, Feb. 2, 2015, [https://rcfp.org/bodycam\\_policies/NC/Charlotte\\_BWC\\_Policy.pdf](https://rcfp.org/bodycam_policies/NC/Charlotte_BWC_Policy.pdf).

<sup>393</sup> Ibid.

<sup>394</sup> "Police Body Camera Policies: Privacy and First Amendment Protections"; Minneapolis Police Department § 4-223.



right to petition the government for redress of grievances.”<sup>395</sup> The aim of these policies is to avoid the chilling effect that can occur if people feel uneasy or worried being recorded by the police.<sup>396</sup> However, only nine departments of the 23 studied by the Brennan Center for Justice had such policies.<sup>397</sup>

A final departmental policy limits the use of facial recognition technology on BWC footage. Baltimore’s pilot program states that BWC footage “shall not be used to create a database or pool of mug shots” or “be searched using facial recognition software,” though use in a particular incident could be permitted if a supervisor “has reason to believe” a specific suspect is captured on the recording.<sup>398</sup> Baltimore represents the only city of the 23 studied by the Brennan Center for Justice that has a policy to this effect.<sup>399</sup>

Finally, the Fourth Amendment and Supreme Court precedent are also relevant to BWCs. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>400</sup>

BWCs do not invariably raise Fourth Amendment issues, especially if an officer records what is already visible to him or her.<sup>401</sup> In *United States v. Jones*, Justice Antonin Scalia wrote that the Supreme Court has not “deviated from the understanding that mere visual

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<sup>395</sup> “Police Body Camera Policies: Privacy and First Amendment Protections”; Seattle Police Department Manual §16.091 - Body-Worn Video Pilot Program <http://www.seattle.gov/police-manual/title-16---patrol-operations/16091---body-worn-video-pilot-program>.

<sup>396</sup> Brynne O’Neal, “Activists on Film: Police Body Cameras and the First Amendment,” *Huffington Post*, June 20, 2016, [http://www.huffingtonpost.com/brynne-oneal/activists-on-film-police\\_b\\_10572370.html](http://www.huffingtonpost.com/brynne-oneal/activists-on-film-police_b_10572370.html).

<sup>397</sup> *Ibid.*

<sup>398</sup> “Police Body Camera Policies: Privacy and First Amendment Protections.”

<sup>399</sup> *Ibid.*

<sup>400</sup> U.S. Const. amend. IV, § 1.

<sup>401</sup> Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 1-19.

observation does not constitute a search.”<sup>402</sup> Additionally, in *U.S. v. Jackson*, the Court found that recording “activity visible to the naked eye does not ordinarily violate the Fourth Amendment.”<sup>403</sup> In *California v. Ciraolo*, the Court held that “Fourth Amendment protection of the home has never extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.”

However, recording with BWCs in certain situations may constitute an unconstitutional search, violating the Fourth Amendment.<sup>404</sup> In a private home, the resident has a reasonable expectation of privacy from both police observation as well as police presence.<sup>405</sup> In *Kyllo v. United States*, the Supreme Court found that private places, particularly “the home,” require protection from “prying government eyes” because “all details are intimate details.”<sup>406</sup> Justice Scalia, writing for the majority, added “[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”<sup>407</sup>

Thus, officers are required to either have a search warrant or the resident’s consent to enter the home.<sup>408</sup> However, even when the officer has a search warrant, BWCs could still create Fourth Amendment problems, for two main reasons.<sup>409</sup> First, a search warrant does not allow police to search every part of a home.<sup>410</sup> For example, if the warrant allowed searching only one room, the camera would have to be turned off for

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<sup>402</sup> *United States v. Jones*, 132 S. Ct. 945, 953 (2012); Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 13.

<sup>403</sup> *United States v. Jackson*, 213 F.3d 1269 (2000); *California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct.1809, 90 L.Ed.2d 201 (1986).

<sup>404</sup> Letourneau, “Police Body Cameras: Implementation with Caution, Forethought, and Policy,” 439-475; Henderson, “Fourth Amendment Time Machines,” 933-974; Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 13.

<sup>405</sup> Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 13.

<sup>406</sup> *Kyllo v. United States* 533 U.S. 27 (2001).

<sup>407</sup> *Id.*

<sup>408</sup> Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 13-16.

<sup>409</sup> *Ibid.*

<sup>410</sup> *Ibid.*

the rest of the home, which is not always practical.<sup>411</sup> Second, a warrant does not give police the authority to rummage through spaces in the home where the object of the warrant, such as a gun, could not possibly be found.<sup>412</sup> However, a BWC might record such a place, such as a document open on a computer, potentially violating the terms of the search warrant.<sup>413</sup> Additionally, the footage taken by a BWC can be zoomed in or otherwise edited to make something visible that may not otherwise have been to the officer.<sup>414</sup> The “plain view doctrine” states there is no reasonable expectation of privacy when officers can see something in a place where they are lawfully present.<sup>415</sup> However, this doctrine also requires that the incriminating characteristic of the object be “immediately apparent.”<sup>416</sup> Thus, the privacy concerns are exacerbated even further because the subsequent storage of BWC footage could provide a permanent record of a private place or objects.<sup>417</sup>

BWCs potentially could violate privacy rights and the Fourth Amendment even in public places, if used as a tool of warrantless surveillance, as discussed in *United States v. Jones*. Justice Sotomayor wrote in a concurring opinion that GPS surveillance “generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”<sup>418</sup> However, BWCs do not have the tracking capability of a GPS unless an officer follows a suspect daily, which is unlikely, given the cost and required resources.<sup>419</sup>

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<sup>411</sup> Ibid.

<sup>412</sup> Ibid.

<sup>413</sup> Ibid.

<sup>414</sup> Ibid.

<sup>415</sup> Ibid.

<sup>416</sup> *Horton v. California*, 496 U.S. 128, 136–137 (1990).

<sup>417</sup> Id.

<sup>418</sup> *Jones*, 132 S. Ct. 945, 953.

<sup>419</sup> Id.

Here, in determining whether the Fourth Amendment may limit recording by BWCs, it is helpful to look at a parallel: “media ride alongs” in which police officers execute warrants in the presence of the press.<sup>420</sup> Four cases demonstrate that the presence of a journalist in a private home during the execution of a warrant is unconstitutional under the Fourth Amendment because the press is not “related to the objectives of the authorized intrusion.”<sup>421</sup> However, BWCs would be more likely to be seen as related to these objectives, suggesting key differences between media ride alongs and the use of BWCs.<sup>422</sup>

The most prominent case is *Wilson v. Layne*.<sup>423</sup> In the early morning hours of April 16, 1992, United States Marshals and Montgomery County Police officers executed three arrest warrants for Dominic Wilson, a man who had violated his probation on three previous felony charges.<sup>424</sup> The warrants were issued as part of “Operation Gunsmoke,” an initiative to arrest dangerous criminals across the country.<sup>425</sup> The warrants did not mention media presence or assistance, but a reporter and photographer from the *Washington Post* were present.<sup>426</sup> Upon the police entering the home of Charles Wilson, Dominic’s father, the elder Wilson ran to the living room to investigate, wearing only a pair of briefs, and yelled at the officers.<sup>427</sup> The officers, thinking Charles was his son Dominic, subdued him to the floor as his wife, Geraldine, entered the room wearing only a nightgown.<sup>428</sup> During the episode, the photographer took numerous pictures, though

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<sup>420</sup> Henderson, “Fourth Amendment Time Machines,” 965; *Wilson v. Layne*, 526 U.S. 603 (1999).

<sup>421</sup> *Wilson*, 526 U.S. 603.

<sup>422</sup> *Smart v. City of Miami*, 107 F.Supp.3d 1271 (S.D. Fla. 2015).

<sup>423</sup> *Wilson*, 526 U.S. 603.

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

they were not published.<sup>429</sup> The print reporter was also present in the living room.<sup>430</sup> In 1999, the Supreme Court took up the case, which raised the question: does media presence during a police entry into a residence violate the Fourth Amendment?<sup>431</sup> The Court found that the Wilsons' Fourth Amendment rights were violated because the warrants entitled the officers, but not a newspaper reporter or photographer, to enter the home.<sup>432</sup> Further, the presence of the reporters was "not related to the objectives of the authorized intrusion" because they were not there to aid in the execution of the warrant.<sup>433</sup>

However, although the Court unanimously concluded that the Wilsons' Fourth Amendment rights were violated, the Court acknowledged government interests could be furthered by law enforcement's own recording in a private home.<sup>434</sup> Such interests include accurately publicizing efforts to combat crime, finding and deterring police abuse, protecting officers, and maintaining evidence.<sup>435</sup>

In *United States v. Hendrixson*, the United States Court of Appeals for the Eleventh Circuit ruled again that the execution of a search warrant in a home, in which a news reporter was present, was a Fourth Amendment violation.<sup>436</sup> The defendants in the case were four individuals convicted and sentenced to jail for conspiracy to possess and to distribute methamphetamine throughout Northern Georgia in the late 1990s.<sup>437</sup> One of the defendants, Mable Stephens, had her apartment searched while a reporter was

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<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> Henderson, "Fourth Amendment Time Machines," 965

<sup>435</sup> *Ibid.*

<sup>436</sup> Henderson, "Fourth Amendment Time Machines," 965; *United States v. Hendrixson*, 234 F.3d 494, 496 (11th Cir. 2000).

<sup>437</sup> *Hendrixson*, 234 F.3d 494, 496.

present.<sup>438</sup> The Court found that the reporter was not aiding in the execution of the warrant, concluding it was a violation of Stephens' Fourth Amendment rights.<sup>439</sup>

Five years later, the Indiana Court of Appeals held that the presence of a film crew during a strip search in the defendant's motel room was a violation of his Fourth Amendment rights in *Thompson v. State*.<sup>440</sup> As part of a June 10, 2003 undercover drug investigation, two officers entered Andra Thompson's hotel room and conducted a strip search of Thompson.<sup>441</sup> As the search was occurring, and in the time one of the officers went to get rubber gloves, a camerawoman from the Oxygen Network filmed the events for the show "Women and the Badge."<sup>442</sup> The Court found that although the strip search was reasonable under the Fourth Amendment, it was unreasonable for the camerawoman to record the search.<sup>443</sup> The Court said that "the line should be drawn here. Otherwise, the next case might well involve a civilian filming or photographing a strip search incident to arrest where the contraband is found and removed from an anal or vaginal cavity."<sup>444</sup> Additionally, the court said that the strip search was not only unprofessional but was unreasonable under the Fourth Amendment ... [and it] degrades the entire legal process."<sup>445</sup>

A final case involving the presence of media at the execution of search warrants by law enforcement arose in 2015.<sup>446</sup> The Southern District Court of Florida found that defendant Taiwan Smart's claim that the police permitting reporters from *First 48*, a cable show that follows police in homicide investigations, to enter his home to film a

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<sup>438</sup> Id.

<sup>439</sup> Id.

<sup>440</sup> *Thompson v. State*, 824 N.E.2d 1265 (Ind. Ct. App. 2005).

<sup>441</sup> Id.

<sup>442</sup> Id.

<sup>443</sup> Ibid.

<sup>444</sup> Ibid.

<sup>445</sup> Ibid.

<sup>446</sup> *Smart*, 107 F.Supp.3d 1271.

murder scene violated his Fourth Amendment rights.<sup>447</sup> The court cited *Wilson* and concluded that the presence of the film crew did not further the purpose of the investigation.<sup>448</sup>

Ultimately, these four cases demonstrate that the presence of a journalist in a private home during the execution of a warrant is unconstitutional under the Fourth Amendment because the press is not “related to the objectives of the authorized intrusion.”<sup>449</sup> However, the cases also suggest that these limitations on filming in private homes or during strip searches may not apply to BWCs.<sup>450</sup> Body cameras would more likely be seen as “related to the objectives of the authorized intrusion,” especially if department or state policies require the use of the BWCs in certain situations.<sup>451</sup> Furthermore, the *Wilson* decision indicated that there are potential benefits of law enforcement having cameras in private places, leaving the door open for BWC use in those situations.<sup>452</sup>

Although body cameras are meant to provide an objective, unambiguous recording that contributes to accountability and transparency, these attributes also raise privacy concerns.<sup>453</sup> Law enforcement agencies must balance the interests of truth and accountability against protection of privacy rights, requiring important policy decisions.<sup>454</sup>

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<sup>447</sup> Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 14.

<sup>448</sup> *Ibid.*

<sup>449</sup> *Wilson*, 526 U.S. 603.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 11-16; “Considering Police Body Cameras,” 1808-1812; Simmons, “Body-mounted Police Cameras” 889-890; Letourneau, “Police Body Cameras: Implementation with Caution, Forethought, and Policy,” 439-475; Blitz, “Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats,” 13-16.

<sup>454</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 11.

## Costs

One final limitation of BWCs is the high financial costs and resources necessary for a body camera program. First, use of BWCs involves significant financial costs for departments and cities. Most fundamentally, the price of each camera can range anywhere from \$120 to nearly \$2,000 for a single device, with the average cost around \$1,000.<sup>455</sup> Departments also need to purchase replacement parts like batteries or lenses.<sup>456</sup> Data storage is an even larger potential financial burden.<sup>457</sup> The New Orleans Police Department, for example, launched a plan that included the purchase and operation of 350 cameras.<sup>458</sup> The cost associated with the plan was \$1.2 million over five years, most of which was allocated to data storage.<sup>459</sup> It is estimated that 250 officers with body cameras would produce 2.3 million videos in three years, all of which require storage as well as personnel to manage it.<sup>460</sup> As a result, besides the cost of the storage, departments will need to hire or allocate personnel to handle all stages of body camera footage, as well as technical and administrative assistance.<sup>461</sup> Technological problems and officer training further increase the human hours associated with body camera footage storage.<sup>462</sup>

In a 2015 poll of police officials conducted by the Major Cities Chiefs and Major County Sheriffs and the U.S. Department of Homeland Security's Office of Emergency

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<sup>455</sup> Ibid., 33; Eric Markowitz, "Police Departments Face A Crucial Question: How To Pay For Body Cameras," *IB Times*, May 12, 2016, <http://www.ibtimes.com/police-departments-face-crucial-question-how-pay-body-cameras-2366968>; "Considering Police Body Cameras," 1794-1817.

<sup>456</sup> Ibid.

<sup>457</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 32-33; Julia Edwards and Anjali Athavaley, "High costs hinder outfitting of U.S. cops with body cameras," *Reuters*, April 23, 2015, <http://www.reuters.com/article/us-usa-police-cameras-idUSKBN0NE14P20150423>; "Considering Police Body Cameras," 1809; Dan Frosch and Valerie Bauerlein, "Louisiana Shooting Highlights Body Camera Issues," *Wall Street Journal*, July 7, 2016, <http://www.wsj.com/articles/louisiana-shooting-highlights-body-camera-issues-1467943690>.

<sup>458</sup> "Henrick Karoliszyn, "NOPD Wearable Cameras Expected to Cost \$1.2 Million," *The Times-Picayune*, Sept. 30, 2013, [http://www.nola.com/crime/index.ssf/2013/09/post\\_346.html](http://www.nola.com/crime/index.ssf/2013/09/post_346.html); Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 32.

<sup>459</sup> Ibid.

<sup>460</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 32.

<sup>461</sup> Ibid., 33; Markowitz, "Police Departments Face A Crucial Question: How To Pay For Body Cameras?"

<sup>462</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 32-33.



Communications, 70 percent of respondents indicated that the need for their departments to improve their IT infrastructure, including storage and network capacity, would require additional spending.<sup>463</sup> 38 percent of respondents cited an increased need for training, both basic and advanced, in how to edit and process BWC footage.<sup>464</sup> Additionally, 36 percent of respondents estimated increases of 1-5 personnel, and just under 25 percent estimated an increase of 5-10 to manage and maintain the BWC program, representing a significant increase in costs related to personnel alone.<sup>465</sup> The high costs departments and cities have to handle will also trickle down to tax increases for the public.<sup>466</sup>

Second, there are particular costs associated with privacy. Many departments, under state law or departmental policy, are required to blur out or otherwise obscure private information, such as forms of identification of people seen or heard in the footage.<sup>467</sup> Other necessary edits include “removing juvenile faces, removal of identifying features of informants and undercover officers, and removal of personal biographical information.”<sup>468</sup> These edits require extra time and personnel to review and redact each tape.<sup>469</sup>

Finally, people who ask to see the footage are often assessed high costs.<sup>470</sup> One Indiana police department required anyone wanting a physical copy of the body camera footage to pay \$150 per video, the maximum allowed by Indiana state law, ostensibly to

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<sup>463</sup> “Major Cities Chiefs and Major County Sheriffs Technology Needs – Body Worn Cameras,” *Major Cities Chiefs and Major County Sheriffs*, 2015, <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvnT.EAJQwK4/v0>.

<sup>464</sup> Ibid.

<sup>465</sup> Ibid.

<sup>466</sup> Brian Bakst and Ryan J. Foley, “For police body cameras, big costs loom in storage,” *Associated Press*, Feb. 6, 2015, <https://www.policeone.com/police-products/body-cameras/articles/8243271-For-police-body-cameras-big-costs-loom-in-storage/>.

<sup>467</sup> “New Body Cam Law Pits Accessibility Versus Affordability,” *Tristate Homepage*, accessed March 7, 2017, <http://www.tristatehomepage.com/news/local-news/new-body-cam-law-pits-accessibility-versus-affordability>; Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 33.

<sup>468</sup> Letourneau, “Police Body Cameras: Implementation with Caution, Forethought, and Policy,” 452.

<sup>469</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 32-33.

<sup>470</sup> “New Body Cam Law Pits Accessibility Versus Affordability”; Suhauna Hussain, “Judge directs Hayward to refund \$3200 charge for editing police footage,” *The Daily Californian*, July 7, 2016, <http://www.dailycal.org/2016/07/07/judge-directs-hayward-to-refund-3200-charge-for-editing-police-footage/>.

help offset the labor and storage associated with the footage.<sup>471</sup> In a lawsuit filed in Hayward, California, an Alameda County judge ruled that Hayward must refund all but \$1 of the amount the city charged for the body camera footage of a December 2014 Black Lives Matter protest.<sup>472</sup> The city originally charged about \$3,200 for the footage.<sup>473</sup> One of the lawyers who represented the National Lawyers Guild argued that the public interest of citizens being able to afford the footage, as well as the goals of accountability and transparency, outweighed the financial concerns of the city.<sup>474</sup> Further, low-income, minority communities would be particularly hard-hit by these costs.<sup>475</sup> As a result, the individuals and groups that BWCs are theoretically supposed to benefit would not be able to access the BWC footage, preventing the implementation of BWCs from fixing the broken trust between the police and minority communities.<sup>476</sup>

Although President Barack Obama pledged millions of dollars to help departments and cities handle the high costs associated with body cameras, it was still not enough for some police departments.<sup>477</sup> Several in the course of four years have stopped their body camera programs, including Indianapolis in 2016.<sup>478</sup> In Michigan, Oakland County Sheriff Michael Bouchard had previously said the startup costs associated with

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<sup>471</sup> “New Body Cam Law Pits Accessibility Versus Affordability.”

<sup>472</sup> Hussain, “Judge directs Hayward to refund \$3200 charge for editing police footage.”

<sup>473</sup> Ibid.

<sup>474</sup> “National Lawyers Guild v. Hayward PD (Bodycam Records),” *American Civil Liberties Union of Northern California*, June 24, 2016, <https://www.aclunc.org/our-work/legal-docket/national-lawyers-guild-v-hayward-pd-bodycam-records>.

<sup>475</sup> “New Body Cam Law Pits Accessibility Versus Affordability.”

<sup>476</sup> Ibid.

<sup>477</sup> Meyer, “Body Cameras Are Betraying Their Promise”; Markowitz, “Police Departments Face A Crucial Question: How To Pay For Body Cameras?”; Matthew Feeney, “Where Does the Fed Stand On Body Cameras,” *Forbes*, Dec. 3, 2015, <https://www.forbes.com/sites/matthewfeeney2/2015/12/03/the-federal-government-must-do-better-on-body-cams/#147efb3e147e>; Mark Berman, “Justice Dept. will spend \$20 million on police body cameras nationwide,” *Washington Post*, May 1, 2015, [https://www.washingtonpost.com/news/post-nation/wp/2015/05/01/justice-dept-to-help-police-agencies-across-the-country-get-body-cameras/?utm\\_term=.cdc77be76480](https://www.washingtonpost.com/news/post-nation/wp/2015/05/01/justice-dept-to-help-police-agencies-across-the-country-get-body-cameras/?utm_term=.cdc77be76480); David Ingram, “California shooting shows slow adoption of police body cameras,” *Reuters*, Sept. 29, 2016, <http://www.reuters.com/article/us-usa-police-cameras-idUSKCN11Z2QK>.

<sup>478</sup> “New Body Cam Law Pits Accessibility Versus Affordability”; “Two US police departments drop body cameras over costs,” *Aljazeera*, Sept. 11, 2016, <http://www.aljazeera.com/news/2016/09/police-departments-drop-body-cameras-costs-160911075457471.html>.

equipping his 900 officers with BWCs would amount to over \$1 million every year.<sup>479</sup>

Bouchard called the costs “a deal-breaker.”<sup>480</sup> In a 2014 survey conducted by PERF, 39 percent of agencies that responded said the number one reason they do not use BWCs is the cost.<sup>481</sup>

Ultimately, BWCs are ideally meant to be a mechanism for truth and greater accountability, but these functions must be weighed against the potential limitations that stem from the financial burdens BWCs have on departments, cities, and the public.

### **ACLU & PCOC Recommendations**

Recommendations made by the ACLU and the Minneapolis PCOC attempt to address how the concerns of reliability, privacy, and costs can be limited with the proper policies, while still maintaining the aims of BWCs as a means of truth and accountability.

The ACLU recommends two possible solutions to concerns about police manipulation of video and police discretion of turning off the camera. First is the creation of an automated trigger.<sup>482</sup> In much the same way as a dash camera begins recording when the car’s sirens or lights are activated, a BWC automated trigger could begin recording when it detects raised voices or certain types of movement.<sup>483</sup> Since the ACLU report was published in 2015, companies have begun developing this technology, though it remains in its infancy and is not yet ready for use by law enforcement.<sup>484</sup>

The ACLU’s second option advocates for “effective means of limiting officers’ ability to choose which encounters to record” by requiring an officer to record any “call

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<sup>479</sup> “Two US police departments drop body cameras over costs.”

<sup>480</sup> Ibid.

<sup>481</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 31.

<sup>482</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 4.

<sup>483</sup> Ibid.

<sup>484</sup> “Five Year Total Cost of Ownership Analysis: Typical Clip-On Body Cameras compared to Utility BodyWorn™ Video Camera,” *Utility*, May 2016, <http://utility.com/perch/resources/bodyworn-total-cost-of-ownership-analysis-may-2016-1.pdf>.

for service or ... any other law enforcement or investigative encounter between a police officer and a member of the public.”<sup>485</sup> In other words, departments must outline clear policies for when BWCs should be on or off. These could include stops, arrests, consensual interviews and searches, and any encounter that becomes “hostile or confrontational.”<sup>486</sup> If the camera is not turned on by the officer in these situations, disciplinary action must be taken against the officer.<sup>487</sup> The ACLU retreated from its initial call for continuous recording made in its original 2013 publication because of the significant privacy concerns it identified as associated with such a policy.<sup>488</sup>

The PCOC came to similar conclusions.<sup>489</sup> The organization called for a requirement that patrol officers activate cameras “for all consensual community contacts, all calls for service and all law enforcement activities” and preventing officers from editing or viewing footage before writing reports.<sup>490</sup> Additionally, both the ACLU and PCOC call for policies that would prohibit recording individuals participating in First Amendment-protected activities, so long as they are acting lawfully.<sup>491</sup> Ultimately, although it is not possible yet to avoid some level of police discretion in activating the cameras, both the ACLU and PCOC provide recommendations that take reliability and privacy into account while still ensuring the cameras capture what they are supposed to.

Second, both the ACLU and PCOC recommend ways to reduce privacy concerns even further while still promoting the ideals and perceived benefits of BWCs. The ACLU in particular recognizes that despite the potential benefits of BWCs, the risks of invading privacy and surveillance need to be addressed: “Without good policies, body cameras risk

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<sup>485</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 4.

<sup>486</sup> Ibid.

<sup>487</sup> Ibid.; “Body Camera Implementation Research and Study,” 7-8.

<sup>488</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 3.

<sup>489</sup> “Body Camera Implementation Research and Study,” 5-11.

<sup>490</sup> Ibid., 10.

<sup>491</sup> Ibid., 8; Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 6.

becoming just another police surveillance device – and one with very real potential to invade privacy.”<sup>492</sup> The ACLU is also particularly concerned about the use of cameras for the purpose of general surveillance of the public.<sup>493</sup> Thus, without proper policies, BWCs may be the next step in a line of “policing initiative that have been adopted in the name of “protecting” civilians [but] later be[ing] used against them.”<sup>494</sup> As a result, both organizations suggest that officers should be required to notify people that they are recording, either by stating it orally, or by another means such as a pin or a blinking red light when the camera is activated.<sup>495</sup> This is especially important in private homes.<sup>496</sup> Additionally, both organizations call for preventing recording during SWAT raids and similar police actions where there is a higher likelihood privacy rights could be violated.<sup>497</sup>

Finally, the ACLU and PCOC suggest one means of reducing costs associated with BWCs. Their policy recommendations call for retention periods of footage to be “no longer than necessary.”<sup>498</sup> Any footage that is not flagged by the department when it is entered into storage as involving the use of force, leading to an arrest, or that is part of a complaint, should be deleted after weeks, not years.<sup>499</sup> Only if a recording is flagged should it be retained indefinitely beyond the window of time for filing a civilian complaint.<sup>500</sup> The ACLU argues that in circumstances where the footage is flagged, the

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<sup>492</sup> “Portland Police Body Camera Policy Is Critical For Accountability,” *American Civil Liberties Union of Oregon*, Oct. 4, 2016, <http://www.aclu-or.org/content/portland-police-body-camera-policy-critical-accountability>.

<sup>493</sup> *Ibid.*

<sup>494</sup> Travis S. Triano, “Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Citizens in Timeout,” *Cardozo Law Review* 34, (2012): 408; “Considering Police Body Cameras,” 1812.

<sup>495</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 5; “Body Camera Implementation Research and Study,” 18.

<sup>496</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 6-7.

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*

<sup>499</sup> *Ibid.*

<sup>500</sup> *Ibid.*; “Body Camera Implementation Research and Study,” 24-27.

need for oversight outweighs the concerns over privacy.<sup>501</sup> By following these procedures, the costs associated with the maintenance of BWC footage can be reduced, and privacy concerns related to government surveillance of the public's everyday activities minimized.<sup>502</sup>

There are also other reasons to believe that the costs associated with BWCs could drop in the future. First, increasing competition between manufacturers for departments to use their products creates the potential for the prices of BWCs to fall.<sup>503</sup> On April 5, 2017, Axon, formerly known as Taser, the largest vendor of BWCs in the United States, announced it would provide free body cameras to all American law enforcement and a year's worth of access to their cloud storage service, Evidence.com.<sup>504</sup> Although the offer has the potential to provide significant savings for departments, the move has also raised concerns.<sup>505</sup> Some departments are hesitant because it would mean the company would have access to all their BWC footage.<sup>506</sup> Some law enforcement officials called it a "PR stunt," though Axon denied those allegations.<sup>507</sup> Additionally, some city councils, like in Madison, Wisconsin, restrict which companies can supply BWCs to local departments.<sup>508</sup> Second, manufacturers of the cameras and data storage companies are developing solutions to not only reduce the cost of the cameras, but also the high costs of data

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<sup>501</sup> Stanley, "Police Body-Mounted Cameras: With Right Policies In Place, A Win For All," 6-7.

<sup>502</sup> Ricky Ribeiro, "Law Enforcement Challenged with Funding Storage Investments for Body Cameras," *StateTech Magazine*, April 21, 2016, <http://www.statetechmagazine.com/article/2016/04/law-enforcement-challenged-funding-storage-investments-body-cameras>; Stanley, "Police Body-Mounted Cameras: With Right Policies In Place, A Win For All," 6-7; "Body Camera Implementation Research and Study," 24-27.

<sup>503</sup> Amina Elahi, "Motorola Solutions joins battle to supply police body cameras," *Chicago Tribune*, Oct. 21, 2015, <http://www.chicagotribune.com/bluesky/originals/ct-motorola-solutions-body-camera-bsi-20151020-story.html>.

<sup>504</sup> Cyrus Farivar, "Taser stuns law enforcement world, offers free body cameras to all US police," *Ars Technica* April 5, 2017, <https://arstechnica.com/tech-policy/2017/04/taser-announces-free-body-cameras-cloud-storage-to-all-us-cops-for-a-year/>.

<sup>505</sup> Ibid.

<sup>506</sup> Jonathan Berr, "Free police body cameras: PR stunt or a step forward?" *CBS News MoneyWatch*, April 7, 2017, <http://www.cbsnews.com/news/taser-axon-free-body-cameras-police/>.

<sup>507</sup> Ibid.

<sup>508</sup> Ibid.

management and retention.<sup>509</sup> Automated video redaction and classification could reduce staffing costs by over one-third.<sup>510</sup> This technology would also allow an automatic trigger for BWCs to start recording, a suggestion made by the ACLU.<sup>511</sup> Cloud-based video storage could also represent decrease storage costs while also improving law enforcement agencies' ability to analyze data, manage it more effectively, and more.<sup>512</sup> However, cloud storage also raises concerns about the security or the vulnerability of the footage to hacking efforts.<sup>513</sup> Finally, decreased complaints and quicker resolution of conflicts/disputes as a result of BWCs may lead to cost savings on litigation. Moreover, federal aid provided to several departments by Congress and the Obama administration has helped ease the burden of BWC programs.

Although these recommendations do not solve all the issues related to the reliability, privacy, and cost related to BWCs, they represent a means of mitigating these concerns, while still prioritizing and allowing the potential benefits of the cameras. As a result, these recommendations allow for a “win-win” for with all parties involved.<sup>514</sup>

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<sup>509</sup> Harriet Taylor, “New gun cameras offer a ‘cops-eye’ view of policing,” *CNBC*, Jan. 11, 2017, <http://www.cnbc.com/2017/01/11/gun-cameras-replace-body-cameras-police-departments.html>; “Five Year Total Cost of Ownership Analysis”; Adam Stone, “Weighing the Benefits and Costs of Police Body Cameras,” *Insights*, accessed March 7, 2017, <https://insights.samsung.com/2015/11/18/weighing-the-benefits-and-costs-of-police-body-cameras/>; Ricky Ribeiro, “Law Enforcement Challenged with Funding Storage Investments for Body Cameras,” *StateTech Magazine*, April 21, 2016, <http://www.statetechmagazine.com/article/2016/04/law-enforcement-challenged-funding-storage-investments-body-cameras>; “Policing the Body-Worn Camera Data Deluge,” *Accenture*, 2015, [https://www.accenture.com/t20160606T221616\\_\\_w\\_\\_/us-en/\\_acnmedia/PDF-17/Accenture-Policing-Body-Worn-Camera-Data-Deluge.pdf](https://www.accenture.com/t20160606T221616__w__/us-en/_acnmedia/PDF-17/Accenture-Policing-Body-Worn-Camera-Data-Deluge.pdf).

<sup>510</sup> “Five Year Total Cost of Ownership Analysis.”

<sup>511</sup> *Ibid.*

<sup>512</sup> *Ibid.*; Stone, “Weighing the Benefits and Costs of Police Body Cameras”; “Policing the Body-Worn Camera Data Deluge.”

<sup>513</sup> *Ibid.*

<sup>514</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 2; “Body Camera Implementation Research and Study,” 4-5.

## Chapter 6: Access to BWC Footage

### Law and Policies

Throughout this paper, perceived benefits of BWCs have been balanced with potential limitations, focusing primarily on how BWCs themselves operate and the reliability of the footage. However, this balancing also becomes necessary when considering how to approach disclosing BWC footage to the public, if at all.<sup>515</sup> Policymakers must carefully balance openness with privacy rights, among other concerns, when deciding if the public should have access.<sup>516</sup>

On one hand, the release of footage is necessary in order for BWCs to be an instrument of the search for truth and an accountability mechanism. If the public, or even defense attorneys, do not have the right to watch the footage, it is possible that evidence cannot be used, or that police misconduct will go unchecked.<sup>517</sup> On the other hand, law enforcement agencies also carefully regulate disclosure in order to protect private citizens as well as reduce financial costs.<sup>518</sup> Departments have also expressed concerns related to the accuracy of the footage, arguing that it can be inconclusive or inaccurate.<sup>519</sup> Police may also withhold the footage to avoid being proven at fault or incorrect if their testimony does not match what is depicted in the video.<sup>520</sup>

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<sup>515</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 12; Sarah Breitenbach, “States Grapple With Public Disclosure of Police Body-Camera Footage,” *The Pew Charitable Trusts Stateline*, Sept. 22, 2015, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/09/22/states-grapple-with-public-disclosure-of-police-body-camera-footage>; Chris Pagliarella, “Police Body-Worn Camera Footage: A Question of Access,” *Yale Law & Policy Review* 34, no. 2 (2016): 534-543, <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1705&context=ylpr>.

<sup>516</sup> *Ibid.*

<sup>517</sup> Breitenbach, “States Grapple With Public Disclosure of Police Body-Camera Footage.”

<sup>518</sup> *Ibid.*; Pagliarella, “Police Body-Worn Camera Footage: A Question of Access.”

<sup>519</sup> “Police accountability: Why body cam footage is not always released,” *BBC News*, Sept. 25, 2016, <http://www.bbc.com/news/world-us-canada-37440114>; Sanburn, “Why Police Departments Don’t Always Release Body Cam Footage.”

<sup>520</sup> “Police accountability: Why body cam footage is not always released.”



At the state level, there are public disclosure laws and open records laws, often called Freedom of Information (FOI) laws, which determine whether BWC footage is subject to being released to the public.<sup>521</sup> States frequently model their own statutes after the federal Freedom of Information Act (FOIA).<sup>522</sup> FOIA is meant to give the public “the right to access information from the federal government. It is often described as the law that keeps citizens [informed] about their government.”<sup>523</sup> FOIA’s purpose is to increase accountability and transparency, although it also exempts disclosure of law enforcement records where it

(A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution ... (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.<sup>524</sup>

Each FOI law, like the federal statute, has the purpose of creating increased government accountability and transparency.<sup>525</sup> Even though the definition of a public record is often broad and differs between states, FOI laws are still applicable to BWCs in several ways.<sup>526</sup> First, it would seem BWC footage is a public record subject to disclosure because it is created by law enforcement and is related to the public’s business.<sup>527</sup>

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<sup>521</sup> Pagliarella, “Police Body-Worn Camera Footage: A Question of Access,” 534-543.

<sup>522</sup> Josh Divine, et al., “Police Body Cam Footage: Just Another Public Record,” *The Media Freedom and Information Access Clinic*, December 2015, 5-6, [http://isp.yale.edu/sites/default/files/publications/police\\_body\\_camera\\_footage-just\\_another\\_public\\_record.pdf](http://isp.yale.edu/sites/default/files/publications/police_body_camera_footage-just_another_public_record.pdf).

<sup>523</sup> “What is FOIA,” *FOIA.GOV*, accessed March 7, 2017, <https://www.foia.gov/>.

<sup>524</sup> 5 U.S.C. § 552(b)(7) (2012).

<sup>525</sup> *Ibid.*

<sup>526</sup> Adam Marshall, “Police bodycam videos: The Wild West of open records requests,” *Reporters Committee For Freedom Of The Press*, accessed March 7, 2017, <https://www.rcfp.org/bodycam-video-access>.

<sup>527</sup> *Ibid.*

However, exemptions in state statutes make it a bit more complicated.<sup>528</sup> Most state laws contain exceptions for records that are part of an ongoing police investigation or that could jeopardize a criminal prosecution if disclosed.<sup>529</sup> In Indiana, state law creates a broad exception for “investigatory records of law enforcement agencies ... at the discretion of a public agency.”<sup>530</sup> However, some courts have found that footage is not always covered by this exception.<sup>531</sup> For example, in *Paff v. Ocean County Prosecutor's Office*, Justice John C. Kennedy in the Superior Court of New Jersey, Appellate Division affirmed a district court decision to require the disclosure of footage from mobile video recorders in police vehicles taken during a traffic stop because the footage was “neither exempt as a ‘criminal investigatory record,’ N.J.S.A. 47:1A-1.1, nor excepted as part of an ‘investigation in progress,’ N.J.S.A. 47:1A-3(a).”<sup>532</sup> Some states allow personnel files and/or disciplinary records to be made public, such as footage used to monitor officer performance.<sup>533</sup> However, because the footage is exempt from public disclosure if it is part of a disciplinary investigation, the identity of the officer(s) will likely be redacted or the footage will be withheld from public disclosure.<sup>534</sup> A third type of exemption, as discussed earlier in the paper, is intended to protect privacy interests, particularly of crime victims and witnesses.<sup>535</sup> Almost all states have some type of privacy exemptions, though disclosure of BWC footage may be in the “public interest” overcoming the exemptions.<sup>536</sup>

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<sup>528</sup> Marshall, “Police bodycam videos: The Wild West of open records requests.”

<sup>529</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 18.

<sup>530</sup> IND. CODE § 5-14-3-4(b)(i) (2014).

<sup>531</sup> *Paff v. Ocean County Prosecutor's Office*, 141 A.3d 300 (2016); “Considering Police Body Cameras,” 1794-1817.

<sup>532</sup> *Ibid.*

<sup>533</sup> Marshall, “Police bodycam videos: The Wild West of open records requests.”

<sup>534</sup> *Ibid.*

<sup>535</sup> Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*, 12.

<sup>536</sup> Marshall, “Police bodycam videos: The Wild West of open records requests.”

Department policies regarding the disclosure of footage often intersect with many of these state laws, but vary widely across the nation, as demonstrated by two very different department policies.<sup>537</sup> In Los Angeles, police officials defended their strict departmental policy requiring anyone wanting to obtain BWC footage to file a suit in superior court.<sup>538</sup> Additionally, police officers would be able to see the footage before it is released.<sup>539</sup> The officials defended the policy on the grounds that “overly lax rules could end up helping criminals[,] jury pools could be tainted, ... eyewitnesses and informants may be reluctant to come forward if there’s a chance they were caught on a video that may be publicly released[,] and other people caught on camera may file lawsuits claiming that police violated their right to privacy.”<sup>540</sup> Conversely, in Muskogee, Oklahoma, police officials and lawmakers embraced disclosure, rather than requiring the requesters to seek consent from a judge.<sup>541</sup> The department reaffirmed these beliefs after a police-involved shooting killed a man rumored to be unarmed.<sup>542</sup> The growing civil unrest following the shooting significantly subsided after the public was able to see the footage.<sup>543</sup> As a result, Deputy Police Chief Chad Farmer said the department “will continue to release the videos. That’s our policy. That’s not going to change if we think it isn’t going to make us look good.”<sup>544</sup>

The state laws most applicable to the disclosure of BWC footage have largely been drafted in the last five years. Twenty-one states have passed laws specifically

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<sup>537</sup> Kindy and Tate, “Police Withhold Videos Despite Vows of Transparency”; “Considering Police Body Cameras,” 1794-1817; Nick Wing, “Here’s How Police Could End Up Making Body Cameras Mostly Useless,” *Huffington Post*, Oct. 10, 2015, [http://www.huffingtonpost.com/entry/police-body-camera-policy\\_us\\_5605a721e4b0dd8503079683](http://www.huffingtonpost.com/entry/police-body-camera-policy_us_5605a721e4b0dd8503079683).

<sup>538</sup> *Ibid.*

<sup>539</sup> *Ibid.*

<sup>540</sup> Kindy and Tate, “Police Withhold Videos Despite Vows of Transparency.”

<sup>541</sup> *Ibid.*

<sup>542</sup> *Ibid.*

<sup>543</sup> “Access to Police Body-Worn Camera Video,” *Reporters Committee For Freedom of the Press*, accessed March 7, 2017, <https://www.rcfp.org/bodycams>.

<sup>544</sup> *Ibid.*

regarding public access to body-worn camera footage.<sup>545</sup> Several states' laws require police departments to draft their own policies.<sup>546</sup> The majority of state laws deny public access to body camera footage unless certain criteria are met.<sup>547</sup> Minnesota can serve as a representative case study.

### **Case Study: Minnesota SF 498**

Introduced in the Minnesota Senate in February 2015, Minnesota SF 498 was drafted with the intention of making the majority of footage recorded by BWCs “private or nonpublic data.”<sup>548</sup> This case study of SF 498 will first address how the law amended the Minnesota Government Data Practices Act (MGDPA) and added an additional section governing access to BWC footage in Minnesota.<sup>549</sup> Second, it will examine the main arguments in the lobbying efforts of three parties: government accountability activists, law enforcement officers, officials and organizations, and organizations speaking on behalf of minority communities, particularly the black community. In so doing, it will demonstrate the balancing of accountability with privacy called for in this paper’s theoretical framework. Finally, it will illustrate several conclusions of this paper, including (1) that the BWC debate is more complex than appears on the surface, (2) that BWCs are not a panacea, but may still be part of the solution to the societal interests they are meant to address, and (3) that balancing ideals of the cameras against potential limitations or harms is not only necessary, but also must be done properly to be a “win-win” for all parties and to ensure the cameras can, in fact, be part of that solution.<sup>550</sup>

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<sup>545</sup> Ibid.

<sup>546</sup> Kelly Swanson, “Advocates push back against FOIA exemptions for bodycam footage,” *Reporters Committee For Freedom Of The Press*, June 9, 2015, <http://www.rcfp.org/browse-media-law-resources/news/advocates-push-back-against-foia-exemptions-bodycam-footage>.

<sup>547</sup> Ibid.

<sup>548</sup> Minn. Stat. § 13.825(2) (2016).

<sup>549</sup> Id.

<sup>550</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 2.

Signed by Minnesota Governor Mark Dayton on May 31, 2016, SF 498 amended portions of the MGDPA, specifically “13.82 Comprehensive Law Enforcement Data,” and added an additional section, “13.825 Portable Recording Systems,” containing the major provisions governing access to BWC footage.<sup>551</sup> Enacted in 1974, the purpose of the MGDPA is to “balance the public’s right to know what their government is doing, individuals’ right to privacy in government data created and maintained about them, and the government’s need to function responsibly and efficiently.”<sup>552</sup> The MGDPA defines government data as “data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use.”<sup>553</sup>

Under the MGDPA, all government data is either “data on individuals,” meaning an individual “is or can be identified as the subject of that data,” or “data not on individuals,” meaning an individual is not identifiable.<sup>554</sup> Next, the MGDPA classifies government data into three categories. The first category is “public data,” which is any data not classified by state statute or federal law as either private or confidential.<sup>555</sup> Public data is accessible to “anyone for any reason.”<sup>556</sup> The second category is “private data” and “nonpublic data,” which are not accessible to the public, but are accessible to the subject of the data and government officials whose duties reasonably require access.<sup>557</sup> Data is classified as private, instead of nonpublic, if it is “data on

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<sup>551</sup> Id.

<sup>552</sup> Donald A. Gemberling and Gary A. Weissman, “Data Privacy: Everything You Wanted to Know About the Minnesota Government Data Practices Act – From ‘A’ to ‘Z,’” *William Mitchell Law Review* 8, (1982): 574, [http://heinonline.org/HOL/Page?handle=hein.journals/wmitch8&div=31&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/wmitch8&div=31&g_sent=1&collection=journals); “Data Practices: Analyze, Classify, Respond,” *League of Minnesota Cities*, July 22, 2016, [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0ahUKEwic0rzh\\_JzTAhVJjFQKHYYtD08QFgheMAG&url=http%3A%2F%2Fwww.lmc.org%2Fmedia%2Fdocument%2F1%2Fdatapactices.pdf&usg=AFQjCNF--cYf-eiSm4-PWy2mrqLEB5fgAg&sig2=\\_iuJeT0TCtjjPBqVEgsqzQ&cad=rja](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&ved=0ahUKEwic0rzh_JzTAhVJjFQKHYYtD08QFgheMAG&url=http%3A%2F%2Fwww.lmc.org%2Fmedia%2Fdocument%2F1%2Fdatapactices.pdf&usg=AFQjCNF--cYf-eiSm4-PWy2mrqLEB5fgAg&sig2=_iuJeT0TCtjjPBqVEgsqzQ&cad=rja).

<sup>553</sup> Minn. Stat. § 13.01 (2016); Gemberling and Weissman, “Data Privacy,” 580.

<sup>554</sup> Minn. Stat. § 13.02 (2016).

<sup>555</sup> Id.

<sup>556</sup> Id.; “Data Practices: Analyze, Classify, Respond.”

<sup>557</sup> Minn. Stat. § 13.02; Gemberling and Weissman, “Data Privacy,” 580.

individuals.”<sup>558</sup> Conversely, data is classified as nonpublic if it is “data not on individuals.”<sup>559</sup> The third category is “confidential data” and “protected nonpublic data,” which are neither accessible to the public, nor to the subject of it.<sup>560</sup> The data is only available to government officials whose duties reasonably require access.<sup>561</sup> Data is classified as confidential, instead of protected nonpublic, if it is “data on individuals.”<sup>562</sup> The phrase “not public data” refers to any data classified as private, nonpublic, confidential, or protected nonpublic and is used throughout the MGDPA.<sup>563</sup>

<b>Cat.</b>	<b>Data On Individuals</b>	<b>Degree of Accessibility</b>	<b>Data Not On Individuals</b>
(1)	Public	Accessible to anyone	Public
(2)	Private	Accessible to data subjects and government officials whose duties reasonably require access. Not accessible to the public.	Nonpublic
(3)	Confidential	Accessible to government officials whose duties reasonably require access, but not to the public. Not accessible to the public or data subjects.	Protected, Nonpublic

*Table 6.1 Minnesota Government Data Practices Act Data Classifications*<sup>564</sup>

<sup>558</sup> Minn. Stat. § 13.02.

<sup>559</sup> Id.

<sup>560</sup> Id.

<sup>561</sup> Id.

<sup>562</sup> Id.

<sup>563</sup> Id.

<sup>564</sup> Gemberling and Weissman, “Data Privacy,” 579; Minn. Stat. § 13.02.

If a government agency wishes to deny disclosure of data to the public or the data subject, but has no federal or state law to support the denial, the agency can request a temporary classification of data as nonpublic.<sup>565</sup> To do so, the agency must file an application to the Commissioner of Administration.<sup>566</sup> The applicant must demonstrate first that no statute exists either allowing or forbidding classification of the data as not public.<sup>567</sup> Second, the applicant must either show that the data is similar to data already classified as not public by other government entities or that “public access to the data would render unworkable a program authorized by law.”<sup>568</sup> Finally, the applicant must demonstrate that a “compelling need exists for immediate temporary classification, which if not granted could adversely affect the health, safety, or welfare of the public, or the data subject’s well-being or reputation.”<sup>569</sup>

The MGDPA “establishes a presumption that government data are public.”<sup>570</sup> Thus, any government data “shall be public unless classified by statute or temporary classification.”<sup>571</sup> However, despite this apparent presumption, there are many instances in the MGDPA where data is classified as private or nonpublic. One example is “electronic access data” which is “created, collected, or maintained about a person’s access to a government entity’s computer for the purpose of (1) gaining access to data or information; (2) transferring data or information; or (3) using government services.”<sup>572</sup> This data is classified as private or nonpublic data.<sup>573</sup> Another example is the racial

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<sup>565</sup> Gemberling and Weissman, “Data Privacy,” 580-581; Minn. Stat. § 13.06 (2016)

<sup>566</sup> Minn. Stat. § 13.06.

<sup>567</sup> *Id.*

<sup>568</sup> *Id.*

<sup>569</sup> *Id.*

<sup>570</sup> Minn. Stat. § 13.01(3); Gemberling and Weissman, “Data Privacy,” 580.

<sup>571</sup> Minn. Stat. § 13.02(7).

<sup>572</sup> *Id.* § 13.15(1) (2016).

<sup>573</sup> *Id.*

identity of individual public employees.<sup>574</sup> Because race is not one of the items related to personnel data made public, it is, therefore, classified as private.<sup>575</sup> Audio recordings of calls placed to a 911 system are also considered private data, though the written transcripts are public data if they do not reveal the identity of the caller.<sup>576</sup> As the case study will discuss further, BWC footage provides another example of data classified as private or nonpublic under the MGDPA.

SF 498 made four amendments to the MGDPA, specifically “13.82 Comprehensive Law Enforcement Data.” First, “arrest data,” is defined as “data created or collected by law enforcement agencies which document any actions taken by them to cite, arrest, incarcerate or otherwise substantially deprive an adult individual of liberty.”<sup>577</sup> SF 498 amended this subdivision to include a “portable recording system” in addition to the existing list of technologies, such as automated license plate readers, used to create arrest data.<sup>578</sup> Similarly, “portable recording system” was added to the definition of “response or incident data,” which documents a law enforcement agency’s response to a request for service.<sup>579</sup> Third, “images,” “recordings,” “video,” and “audio” were added to the definition of “criminal investigative data.”<sup>580</sup> This data, which includes BWC footage, is classified as confidential or protected nonpublic while an investigation is active.<sup>581</sup> The data is classified as public in an inactive investigation, unless “the data would jeopardize another ongoing investigation or would reveal the identity of individuals,” such as undercover police officers.<sup>582</sup> Finally, SF 498 amends subdivision

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<sup>574</sup> Gemberling and Weissman, “Data Privacy,” 583.

<sup>575</sup> *Ibid.*

<sup>576</sup> Minn. Stat. § 13.82(4) (2016).

<sup>577</sup> *Id.* § 13.82(2).

<sup>578</sup> *Id.*

<sup>579</sup> *Id.* § 13.82(6).

<sup>580</sup> *Id.* § 13.82(7).

<sup>581</sup> *Id.*

<sup>582</sup> *Id.*



15 to allow law enforcement agencies to make any private or nonpublic data accessible to the public, if the agency “determines that the access will aid the law enforcement process, promote public safety, or dispel widespread rumor or unrest.”<sup>583</sup> The subdivision previously only allowed agencies to make confidential or protected nonpublic data available.<sup>584</sup>

SF 498 also created a new section of the MGDPA, “13.825 Portable Recording Systems.” Most significantly, this section includes the provision that the majority of BWC footage is classified as “private data on individuals or nonpublic data,” depending on whether an individual is identified as a subject of the footage.<sup>585</sup> Additionally, a law enforcement agency may redact or withhold access to portions of BWC footage if it is determined to be “clearly offensive to common sensibilities.”<sup>586</sup> Any footage that is not public data under other portions of the MGDPA “retain[s] that classification.”<sup>587</sup>

Although BWC footage is classified as “private data” or “nonpublic data,” the statute includes some circumstances in which it can be released to the public.<sup>588</sup> First, footage that documents “the discharge of a firearm by a peace officer in the course of duty” or “the use of force by a peace officer that results in substantial bodily harm,” can be disclosed.<sup>589</sup> Second, a subject of the data may request that the footage be made accessible to the public.<sup>590</sup> However, other subjects must be redacted if they do not consent to the release of the footage.<sup>591</sup> A police officer’s identity must not be redacted

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<sup>583</sup> Id. § 13.82(15).

<sup>584</sup> Id.

<sup>585</sup> Id. § 13.825(2) (2016).

<sup>586</sup> Id.

<sup>587</sup> Id.

<sup>588</sup> Id.

<sup>589</sup> Id.

<sup>590</sup> Id.

<sup>591</sup> Id. § 13.825(4).

unless it is subject to protection, such as if the officer is undercover.<sup>592</sup> Third, footage that is public personnel data can be released unless it depicts an undercover law enforcement officer or employees of a state correctional facility.<sup>593</sup> Finally, the statute allows any individual, including journalists, to “bring an action in the district court located in the county where portable recording system data are being maintained to authorize disclosure of data that are private or nonpublic.”<sup>594</sup> Any individual can also “challenge a determination . . . to redact or withhold access to portions of data because the data are clearly offensive to common sensibilities.”<sup>595</sup> In making the decision about disclosure, the court must weigh “whether the benefit to the person bringing the action or to the public outweighs any harm to the public, to the law enforcement agency, or to a subject of the data.”<sup>596</sup> Consequently, the court can order all or part of the footage released to the public or only to the person bringing the court action.<sup>597</sup> The individual who brings the action must give notice to both the law enforcement agency and the subjects of the data, if they are known.<sup>598</sup>

“13.825 Portable Recording Systems” also includes several smaller provisions regarding BWC access. First, “portable recording system” is defined as “a device worn by a peace officer that is capable of both video and audio recording of the officer’s activities and interactions with others or collecting digital multimedia evidence as part of an investigation,” thus including BWCs.<sup>599</sup> Additionally, the law defines the subjects of the footage as the officer who recorded the video and any other individual or entity who

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<sup>592</sup> Id. § 13.82(5).

<sup>593</sup> Id. § 13.43(5) (2016).

<sup>594</sup> Id. § 13.825(2).

<sup>595</sup> Id.

<sup>596</sup> Id.

<sup>597</sup> Id.

<sup>598</sup> Id.

<sup>599</sup> Id. § 13.825(1).

was either seen or heard in it.<sup>600</sup> The law also sets out retention policies to be followed by any law enforcement agency in the state.<sup>601</sup> Any footage that is not part of a criminal investigation, active or inactive, must be kept for at least 90 days and then properly destroyed.<sup>602</sup> If the footage documents the discharge of a firearm or the use of force by an officer, a formal complaint is filed related to the incident, or a subject of the footage requests in writing that the footage be kept beyond the applicable retention period, the footage must be retained for at least one year.<sup>603</sup> A government entity can keep the footage for a longer period if it determines it is necessary for evidence in an investigation or trial.<sup>604</sup> Additionally, the law required local law enforcement agencies to take public comments before beginning their BWC program and establish a written policy.<sup>605</sup> The law took effect on August 1, 2016.<sup>606</sup>

During the debate over the legislation and following the signing of the law, three parties voiced their support for or concerns about the law: government accountability advocates, including the Minnesota Coalition on Government Information (MNCOGI); law enforcement officers, officials, organizations, and supporters; and organizations speaking on behalf of minority communities, particularly the black community, including the National Association for the Advancement of Colored People (NAACP) and Minnesota Neighborhoods Organizing for Change (NOC), as well as the American Civil Liberties Union (ACLU) of Minnesota.

The issue at the forefront of lobbying efforts was whether BWC footage should be classified as private or public data. Law enforcement representatives and supporters

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<sup>600</sup> Id. § 13.825(2).

<sup>601</sup> Id. § 13.825(3).

<sup>602</sup> Id.

<sup>603</sup> Id.

<sup>604</sup> Id.

<sup>605</sup> Id. § 626.8473 (2016).

<sup>606</sup> Id.

argued that the footage recorded by BWCs should be given a private or nonpublic data classification throughout the state.<sup>607</sup> Generally, they contended the public did not need access to the majority of officers' calls, such someone having a mental health crisis.<sup>608</sup>

Conversely, government transparency advocates primarily argued that the law should make the majority of BWC footage public, with limited exceptions only for "some special situations that require levels of privacy," such as interviews with criminal sexual conduct victims.<sup>609</sup> Organizations speaking on behalf of minority communities agreed with government transparency activists that the majority of BWC footage should be public.<sup>610</sup> The ACLU of Minnesota, along with multiple black community organizations, advocated for BWC footage to be made public if it is relevant to a civilian complaint filed against an officer, in addition to the circumstances already outlined by the law.<sup>611</sup> Ben Feist, Legislative Director of the ACLU of Minnesota, contended that too little footage would be accessible to the public under the law.<sup>612</sup> He argued that BWC footage

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<sup>607</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017; Andy Skoogman (Executive Director of the Minnesota Chiefs of Police Association) in discussion with the author, March 2017; Maya Rao, "Minnesota legislators struggling to strike balance with body cameras," *Star Tribune*, May 8, 2016, <http://www.startribune.com/minnesota-legislators-struggling-to-strike-balance-with-body-cameras/378594476/>.

<sup>608</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017. "If we had contact with somebody that was reported as suspicious or a group of people that were hanging out at a corner or somebody who may have had a mental health crisis, but there was no law enforcement action or no investigation that resulted from that, those encounters, those contacts, under the law in general, would have been made public. ... We were concerned [about] exposing people to what the nature of some of these calls are."; Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Irene Kao, Intergovernmental Relations Counsel, League of Minnesota Cities); Tad Vezner, "Why can't these 3 police body camera bills find enough common ground," *Twin Cities Pioneer Press*, May 4, 2016, <http://www.twincities.com/2016/03/04/why-cant-these-3-police-body-camera-bills-find-any-common-ground/>. Dennis Flaherty of the Minnesota Police and Peace Officers Association is quoted as saying "there is no compelling need for the public to have access to the huge majority of the things [the police] do every day."

<sup>609</sup> Matt Ehling (member of MCCOGI) in discussion with the author, February 2017.

<sup>610</sup> Vezner, "Dayton signs law governing police body cameras and footage"; Andrew Setterholm, "Minnesota Legislation Helps Clarify Police Body Camera Policies," *Government Technology*, June 7, 2016, <http://www.govtech.com/policy/Minnesota-Legislation-Helps-Clarify-Police-Body-Camera-Policies.html>.

<sup>611</sup> *Ibid.*

<sup>612</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Ben Feist, Legislative Director, ACLU of Minn.).

capturing “incidents resulting in use of force [and] incidents leading to arrest” should also be made public, in addition to footage that “involve[s] encounters about which a formal or informal complaint has been filed.”<sup>613</sup> NOC, an organization created to promote social welfare and social and economic justice to the State of Minnesota, also called for footage to be shared publicly in any case where a civilian complaint was made against a police officer, in addition to other high-profile events.<sup>614</sup>

In arguing for a private or nonpublic data classification, law enforcement lobbyists relied heavily on arguments addressing privacy concerns.<sup>615</sup> They argued that if nearly all BWC footage were private, officers would not have to consider privacy when determining whether to turn their camera on or off.<sup>616</sup> This would result in more footage being recorded by officers, even though the footage would not be made public in most cases.<sup>617</sup> Law enforcement officials and organizations further argued that making the data private would protect individuals, particularly victims, recorded by BWCs.<sup>618</sup> Chief of Police for the Maplewood, Minnesota Police Department Paul Schnell provided a

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<sup>613</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Ben Feist, Legislative Director, ACLU of Minn.).

<sup>614</sup> Tony Williams (Safety Beyond Policing Organizer for Minnesota Neighborhoods Organizing for Change) in discussion with the author, April 2017. “Hopefully [it is] not just police that have access to that footage ... and that when the community wants to see body camera footage, the community can see body camera footage, because these are ultimately officers who our tax dollars pay for and they are not living up to scratch a lot of the time.”

<sup>615</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017. “We felt that the interactions between an officer and member of the public was something that deserved at least some level of protection.”; Andy Skoogman (Executive Director of the Minnesota Chiefs of Police Association) in discussion with the author, March 2017. “The biggest challenge is around privacy for the citizens that come in contact with police and then the costs associated with the technology for law enforcement.”; Rao, “Minnesota legislators struggling to strike balance with body cameras.” State Representative Peggy Scott (R-Andover) is quoted as saying “Balancing the public safety needs of law enforcement and the personal privacy of Minnesota citizens — all while creating transparent policy — is rarely simple, and this issue exemplifies that ongoing dialogue.”

<sup>616</sup> Setterholm, “Minnesota Legislation Helps Clarify Police Body Camera Policies.” Rochester Police Chief Roger Peterson is quoted as saying “What we have is every officer on every call is trying to make that data privacy decision. That’s not what they should be thinking about ... that’s not a good way to do business. The change allows that camera to be on.”

<sup>617</sup> Setterholm, “Minnesota Legislation Helps Clarify Police Body Camera Policies.”

<sup>618</sup> Ibid. Olmsted County Sheriff Kevin Torgerson was quoted as saying “If that data shouldn’t be shared, it won’t be. ... That would, in part, be protecting victims so that in a situation where victims were on body camera or squad camera that their video doesn’t automatically show up on YouTube or somewhere because the public has access to it.”

hypothetical in which an individual files a complaint about a neighbor, leading to the police being called to the neighbor's home.<sup>619</sup> The individual who initiated the complaint, according to Schnell, would be able to go to the department to see the footage recorded by the responding officer's BWC, giving the neighbor access to the home, even if it was a bogus complaint.<sup>620</sup> Similarly, Schnell expressed concern about members of the public making "bulk data requests for video," which he argued would expose the individual requesting the data to the nature of some police calls that he or she did not need to see.<sup>621</sup>

In a May 10, 2016 hearing of the Minnesota House Civil Law and Data Practices Policy Committee, Irene Kao testified on behalf of the League of Minnesota Cities, an organization providing guidance to local governments through policy development, risk management, and other training.<sup>622</sup> Kao, Intergovernmental Relations Counsel for the League, presented a hypothetical scenario addressing privacy concerns in which BWC footage should be classified as private data.<sup>623</sup> Kao argued that a BWC could record something valuable inside a private home during the course of police action.<sup>624</sup> If the footage of the valuable item(s) were made public, Kao contended, it would increase the likelihood that that residence would be the target of theft.<sup>625</sup>

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<sup>619</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017.

<sup>620</sup> Ibid.

<sup>621</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017. "We were concerned that what ultimately could happen is that people would come in and make bulk data requests for video and that we would be submitting this data and really kinda exposing people to what the nature of some of these calls are. ... We felt that the interactions between an officer and a member of the public was something that deserved at least some level of protection."

<sup>622</sup> "About the League," *League of Minnesota Cities*, <http://www.lmc.org/page/1/about-the-league.jsp>; Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (video web media).

<sup>623</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Irene Kao, Intergovernmental Relations Counsel, League of Minnesota Cities).

<sup>624</sup> Ibid.

<sup>625</sup> Ibid.

Government transparency activists and black community representatives were critical of law enforcement lobbyists' and supporters' reliance on these privacy claims. At the same committee hearing in which Kao spoke, Matt Ehling, a transparency advocate representing MCCOGI, argued that her first hypothetical scenario would be classified as private data under a portion of the MGDPA titled "General Nonpublic Data."<sup>626</sup> This section makes private any government data that "would be likely to substantially jeopardize the security of information, possessions, individuals or property against theft, tampering, improper use, attempted escape, illegal disclosure, trespass, or physical injury."<sup>627</sup> Thus, according to Ehling, BWC footage depicting a valuable item, such as a gun safe or jewelry, would be protected from public disclosure.<sup>628</sup> Donald Gemberling, also a transparency advocate for MCCOGI, echoed Ehling's claim that much of the footage that worried law enforcement would not be made public under the MGDPA, such as interviews with criminal sexual conduct victims and other "special situations that require levels of privacy."<sup>629</sup>

Further, organizations advocating for the black community suggested three ways to protect privacy interests without making the majority of BWC footage private. First, the ACLU of Minnesota, with the support of black community organizations, called for stricter mandates over when a camera could be turned on and off.<sup>630</sup> As discussed earlier in the paper, the intention behind these policies is to help minimize privacy concerns by decreasing officer discretion.<sup>631</sup> Second, the ACLU of Minnesota, the NAACP, and

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<sup>626</sup> Minn. Stat. § 13.37 (2016).

<sup>627</sup> Id.

<sup>628</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Matt Ehling, transparency advocate, MCCOGI).

<sup>629</sup> Don Gemberling (member of MCCOGI) in discussion with the author, February 2017.

<sup>630</sup> Vezner, "Dayton signs law governing police body cameras and footage."

<sup>631</sup> Stanley, "Police Body-Mounted Cameras: With Right Policies In Place, A Win For All," 4; "Body Camera Implementation Research and Study," 7-8; Miller, Toliver, and PERF, *Implementing a Body-Worn Camera Program*,

MNCOGI lobbied for a requirement that officers who enter private homes in non-emergency situations should not only notify people they are recording, but should also get consent to record the individuals.<sup>632</sup> In so doing, officers can not only alleviate privacy concerns, but can also “[let] people know they have the opportunity for accountability” and “ensure people are on their best behavior.”<sup>633</sup> Finally, Ehling and Gemberling contended that because the MGDPA already has protections in place for situations with heightened privacy concerns, it was unnecessary for legislators to use a “broad-brush approach” designating the majority of BWC footage private or nonpublic.<sup>634</sup> Feist echoed Gemberling and Ehling’s argument, contending that a “blanket rule that [makes] everything private” was unnecessary.<sup>635</sup> Gemberling, Ehling, and Feist argued that lawmakers should be more specific about what BWC footage should be private, rather than what should be public.<sup>636</sup>

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12; Matt Stroud, “The Big Problem with Police Body Cameras,” *Bloomberg*, Jan. 15, 2015, <http://www.bloomberg.com/news/articles/2015-01-15/police-body-camera-policies-wont-work-if-cops-dont-turn-cameras-on>; Jon Collins, “Dayton Sees ‘serious defects’ in body camera bill,” *MPR News*, May 24, 2016, <https://www.mprnews.org/story/2016/05/24/dayton-sees-defects-body-cam-bill>.

<sup>632</sup> Vezner, “Dayton signs law governing police body cameras and footage”; Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Yusef Mgeni, 1<sup>st</sup> Vice-President, NAACP); Matt Ehling (member of MCCOGI) in discussion with the author, February 2017. “There are a lot of times where police are going up to people’s houses and having conversations with them ... to take a report or talk about a complaint. And those situations where police are being invited in, they should notify people that they have [BWCs] and they should let people tell them whether they want them filming or not. That was the big privacy argument we were making.”

<sup>633</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Ben Feist, Legislative Director, ACLU of Minn.). “The ACLU of Minnesota] would propose that rather than having a blanket rule that we make everything private, we could simply make sure that data obtained in a private residence, when there is anonymous reporting of crimes, or an interview of a crime victim, would be presumptively private data that would not be accessible.”

<sup>634</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Matt Ehling, transparency advocate, MCCOGI); Don Gemberling (member of MCCOGI) in discussion with the author, February 2017.

<sup>635</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Ben Feist, Legislative Director, ACLU of Minn.). “The ACLU of Minnesota] would propose that rather than having a blanket rule that we make everything private, we could simply make sure that data obtained in a private residence, when there is anonymous reporting of crimes, or an interview of a crime victim, would be presumptively private data that would not be accessible.”

<sup>636</sup> *Ibid.*



The main argument for public classification was to provide greater accountability and transparency for law enforcement. MNCOGI argued that most BWC footage has “public oversight value,” meaning the cameras can allow for accountability and transparency of law enforcement.<sup>637</sup> But to achieve these goals, footage from BWCs must be classified as public data so it can easily be accessed by members of the public and the press.<sup>638</sup> In response to law enforcement’s claim that SF 498 would allow a majority of footage of public concern to be released, attorney for the Minnesota Newspaper Association Mark Anfinson argued that the law’s language of “substantial bodily harm” was too narrow. He contended the law “should be broader,” allowing more footage to be made public.”<sup>639</sup>

Representatives of minority communities agreed not only that a public classification is necessary for BWC footage to hold officers accountable, but also that the threshold of “substantial bodily harm” was too narrow. Former president of the Minneapolis chapter of the NAACP Nekima Levy-Pounds argued that a member of the public “being choked” or “slammed to the ground” may not be available under the law because “substantial bodily harm” is a threshold that is “much too high.”<sup>640</sup> Michelle Gross, speaking on behalf of Communities United Against Police Brutality, added that

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<sup>637</sup> Matt Ehling (member of MCCOGI) in discussion with the author, February 2017; Don Gemberling (member of MCCOGI) in discussion with the author, February 2017. “Our focus is almost always accountability. ... In large part, this started with local public officials, like the mayor of Minneapolis, saying we need body cameras. ... And they didn’t say we needed body cameras to use them for investigative tools, they said we need them for accountability and transparency.”

<sup>638</sup> Ibid.

<sup>639</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Mark Anfinson, Attorney, Minn. Newspaper Association); Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017. “We agree that these high-profile incidents are the things that people are really most significantly concerned about ... which is when public scrutiny is at its peak. We felt that provision addressed many of the concerns. That became one of the argument points for us was to say we are supportive that this data is going to be released under these high profile, wide public-interest situations.”

<sup>640</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Nekima Levy-Pounds, Fmr President, NAACP Minneapolis chapter).

stop and frisk, as well as racial profiling cases, would also not be included under the law.<sup>641</sup> Tony Williams, the Safety Beyond Policing Organizer for NOC, argued that if footage were private, the law cannot adequately provide accountability for law enforcement because the “public doesn’t have access to [the footage] most of the time.”<sup>642</sup> Although law enforcement officials and organizations maintained that BWCs would still be an effective means of accountability and transparency under SF 498, government transparency and minority community activists disputed this.<sup>643</sup> Even Chief Schnell acknowledged that the law limits accountability and transparency because “it just makes it that much more challenging to access [the footage].”<sup>644</sup>

Accordingly, the black community in particular contended that SF 498 would not help build trust in the police. Levy-Pounds criticized the bill for not providing more accountability for law enforcement “at a time in which trust by the African-American communities and other communities of color in law enforcement is at an all-time low.”<sup>645</sup> State Representative Tina Liebling (DFL-Rochester) echoed this concern:

This is about whether the public, mainly the news media, is going to be able to look at what the police are doing and review arrests that are made, and kind of get an overall view of how the police are conducting themselves. ... My general view is that most police departments are really struggling to do the best job they can. But it's also really, really important that the public have confidence that's what the police are doing. And that's when it becomes really important that the public have access.<sup>646</sup>

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<sup>641</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Michelle Gross, President, Communities United Against Police Brutality).

<sup>642</sup> Tony Williams (Safety Beyond Policing Organizer for Minnesota Neighborhoods Organizing for Change) in discussion with the author, April 2017.

<sup>643</sup> Andy Skoogman (Executive Director of the Minnesota Chiefs of Police Association) in discussion with the author, March 2017. “[BWCs] will hold law enforcement officers accountable. They will also hold citizens who come in contact with law enforcement accountable as well. From an accountability standpoint, it’s a two-way street and the body cameras provide a tremendous tool. Transparency issues, whether they are real or perceived in communities, body cameras will be [a] window inside law enforcement and they will allow the public to see what goes on [and] what policing is all about.”

<sup>644</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017.

<sup>645</sup> Vezner, “Dayton signs law governing police body cameras and footage.”

<sup>646</sup> Ibid.

Ultimately, even though the law provides some public access, questions remained about whether BWCs can be the means of providing accountability, and whether they can help fix the distrust between minority communities and the police that has persisted for generations.

Throughout the legislative session, law enforcement groups had a greater presence in lobbying efforts than other parties.<sup>647</sup> Yusef Mgeni, 1st Vice-President of the NAACP, acknowledged that “the police have lobbied very well for [SF 498], but also contended that the bill did not fully take the public into account as a result.”<sup>648</sup> W.C. Jordan, president of the Minnesota and Dakotas NAACP, agreed that the legislation “was written basically by police officers, for police officers and pretty much to protect police officers.”<sup>649</sup> Levy-Pounds said, “It weighs too heavily in favor of the perspective of law enforcement.”<sup>650</sup> Rep. Tony Cornish (R-Vernon Center), one of the bill’s sponsors, felt critics of the legislation had “very low participation, hardly any following.”<sup>651</sup> Furthermore, according to Gemberling and Ehling, law enforcement lobbyists had shifted the debate away from accountability and transparency by placing more emphasis on the benefits of BWC footage as an investigative, evidentiary tool.<sup>652</sup> As a result, towards the end of the legislative session, representatives of minority communities in particular

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<sup>647</sup> Ibid.; Matt Ehling and Don Gemberling (members of MCCOGI) in discussion with the author, February 2017.

<sup>648</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Yusef Mgeni, 1<sup>st</sup> Vice-President, NAACP). “It’s a two-way street. If both parties don’t feel that they have some ownership and some engagement in it, it’s not going to be an effective street.”

<sup>649</sup> Setterholm, “Minnesota Legislation Helps Clarify Police Body Camera Policies.”

<sup>650</sup> Vezner, “Dayton signs law governing police body cameras and footage.”

<sup>651</sup> Ibid.

<sup>652</sup> Don Gemberling (member of MCCOGI) in discussion with the author, February 2017. “It became really clear that on many issues that police management and the police unions either had come to some kind of magic, osmotic consensus or had actually sat down and said ‘how could we get where we pretty much agree on where we want to go,’ which is not very much public. And once they got there, we saw different behavior in meetings. There was less discussion about using body cameras for transparency reasons, more focused on them as investigative tools ... We started to run into comments like ‘my son is a cop’ [or] ‘my nephew is a cop.’”

increased their lobbying efforts, placing more emphasis on accountability, transparency, and trust.<sup>653</sup>

In response, Governor Mark Dayton requested several revisions to SF 498.<sup>654</sup> One change removed the distinction between incidents occurring in public or private.<sup>655</sup> Another revision removed the “prior review” mandate allowing officers to review footage before writing reports.<sup>656</sup> Instead, it was left up to departments to determine if “prior review” would be allowed in their jurisdictions.<sup>657</sup> Maplewood, Minnesota is an example of a department that elected to prohibit prior review, in an attempt to provide some of the accountability that government transparency advocates and minority communities felt was missing from the law.<sup>658</sup>

Despite these victories, concerns remained for government transparency activists and black community representatives, particularly that the law did not go far enough in providing means of accountability and transparency.<sup>659</sup> Although these groups acknowledged that there were positive gains made after Governor Dayton requested changes to the legislation in order to promote accountability, they argued that they were “still not enough,” or even that the law “provided almost no accountability whatsoever.”<sup>660</sup> Thus, although the lobbying efforts successfully removed the “prior

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<sup>653</sup> Matt Ehling and Don Gemberling (members of MCCOGI) in discussion with the author, February 2017; Tony Williams (Safety Beyond Policing Organizer for Minnesota Neighborhoods Organizing for Change) in discussion with the author, April 2017; Tad Vezner, “Dayton signs law governing police body cameras and footage,” *Twin Cities Pioneer Press*, May 31, 2016, <http://www.twincities.com/2016/05/31/dayton-signs-law-governing-police-body-cameras-and-footage/>.

<sup>654</sup> Vezner, “Dayton signs law governing police body cameras and footage.”

<sup>655</sup> Matt Ehling (member of MCCOGI) in discussion with the author, February 2017.

<sup>656</sup> Ibid.

<sup>657</sup> Ibid.

<sup>658</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017.

<sup>659</sup> Matt Ehling and Don Gemberling (members of MCCOGI) in discussion with the author, February 2017. “There was less discussion about using body cameras for transparency reasons, more focused on them as investigative tools.”

<sup>660</sup> Ibid.; Tony Williams (Safety Beyond Policing Organizer for Minnesota Neighborhoods Organizing for Change) in discussion with the author, April 2017.

review” provision of the bill, NOC and other black community groups contended that they “still ended up with a bill that ... doesn’t offer any real accountability to officers.”<sup>661</sup>

By examining the arguments and points of view of each party involved in the debate over SF 498, this case study supports the conclusions of this paper, that (1) there is a deep complexity to the BWC debate, (2) BWCs, although not a panacea, still have benefits that can make them *part* of the solution to the societal concerns they are meant to address, and (3) that a balancing of perceived benefits with possible limitations or harms is not only necessary, but must be done properly to ensure BWCs can, in fact, be part of the solution and that all parties are benefited.

First, this case study helps demonstrate the complexity of the BWC debate. The main arguments about whether the footage should be public or private, specifically balancing the desires for accountability and transparency versus the privacy interests of the public, help demonstrate the many considerations that must be taken into account in relation to BWC footage. In fact, all three parties involved in the lobbying efforts around SF 498 recognized the importance of and addressed privacy concerns, but did so in different ways.

The complexity of the BWC debate over access to footage is further illustrated by another sticking point for both sides: the potential chilling effect on minority and low-income communities. Government transparency activists and black community representatives argued that the law, by making footage private, would force an individual who wished to obtain the video to go to the police department where they may not feel comfortable or where they were mistreated.<sup>662</sup> Individuals from minority or low-income

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<sup>661</sup> Tony Williams (Safety Beyond Policing Organizer for Minnesota Neighborhoods Organizing for Change) in discussion with the author, April 2017.

<sup>662</sup> Matt Ehling and Don Gemberling (members of MCCOGI) in discussion with the author, February 2017.

communities, may be “fearful of being profiled or some sort of retaliation.”<sup>663</sup>

Additionally, they may not be knowledgeable about how to navigate the criminal justice system to make a request for footage.<sup>664</sup> Further, the law’s remedy of allowing an individual to request the release of BWC footage in district court was also problematic, due to the high expenses associated with legal action.<sup>665</sup> The result would discourage individuals, particularly from minority or low-income communities, from seeking the release of footage.<sup>666</sup>

Conversely, Law enforcement officials also argued that there are other ways for an individual to request the footage besides having to come to the station or go to court.<sup>667</sup> For example, an individual can authorize a third-party to request the footage with a notarized letter.<sup>668</sup> Additionally, St. Paul Police Commander Axel Henry contended that there was a possible chilling effect on victims depicted in BWC footage.<sup>669</sup> Although data about victims of sexual violence is already private under existing law, Henry argued that these complainants would become increasingly hesitant to come forward if they perceive that the footage depicting them would be released.<sup>670</sup>

These arguments about a potential chilling effect on individuals seeking footage or on victims further demonstrate the complexity of the BWC debate. Policymakers face

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<sup>663</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Yusef Mgeni, 1<sup>st</sup> Vice-President, NAACP).

<sup>664</sup> Ibid.

<sup>665</sup> Don Gemberling (member of MCCOGI) in discussion with the author, February 2017.

<sup>666</sup> Ibid.

<sup>667</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017. “We would accept a notarized signed statement from anybody, whether that’s to the media, whether that was to an attorney [or] an advocacy group ... we just wanted people to be aware that that was an option so that an individual who felt like they were mistreated, didn’t have to walk in on their own and [request] the video of which [they are] a data subject.”

<sup>668</sup> Ibid.

<sup>669</sup> Vezner, “Why can’t these 3 police body camera bills find enough common ground?”

<sup>670</sup> Ibid. St. Paul Police Commander Axel Henry is quoted as saying “We have spent the last 30 years trying to get a group of folks who are victims of certain types of crimes to get them to actually talk to us. ... If [a video of them is] going to get out, or if there’s a perception that it’s going to get out, that’s going to be a big issue.”

myriad conflicting arguments when determining a BWC policy or law that may involve internal issues of which the public is rarely aware.<sup>671</sup> Even lawmakers find it difficult to consider all the issues related to transparency and privacy.<sup>672</sup> Thus, SF 498 illustrates the point made throughout the paper that BWCs are meant to be a solution to a problem that is more complex than appears on the surface and that the debate itself over BWCs is more complicated than many thought.

Second, the case study also supports this paper's claim that BWCs cannot be a perfect solution to the societal concerns they are meant to address. Body cameras "are not a panacea," as concerns remain about the potential limitations or harms of the cameras.<sup>673</sup> Although the cameras are perhaps "better than nothing," they are not a "massive fix."<sup>674</sup> There is other work that must be done to fix "a broken system."<sup>675</sup>

Nevertheless, reaction to SF 498 also suggests that BWCs can, potentially, be beneficial in some ways. Law enforcement officials identified several ways in which BWCs have been beneficial to their departments, including being a training tool, accelerating the process of charging suspects, and leading to faster settlements of cases and complaints.<sup>676</sup> Additionally, Imani Jaafar, director of the Minneapolis Office of

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<sup>671</sup> Ibid. "These are some of the stumbling blocks. It's not just the big picture, the exterior, the public facing side of all the questions related to body cameras. But then, internally, there is whole other level of policy issues that certainly can come up and arise and create significant challenges."

<sup>672</sup> Matt Ehling (member of MCCOGI) in discussion with the author, February 2017. "This one was a very big, sprawling issue that involved both pieces of transparency and pieces of privacy. I think that the legislators were having a hard time getting their hands around all of it, in a lot of the hearings I was in."

<sup>673</sup> Matt Ehling and Don Gemberling (members of MCCOGI) in discussion with the author, February 2017; Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017.

<sup>674</sup> Tony Williams (Safety Beyond Policing Organizer for Minnesota Neighborhoods Organizing for Change) in discussion with the author, April 2017.

<sup>675</sup> Ibid.

<sup>676</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017. "Certainly, we want it for evidentiary purposes. It's a great benefit for that. We're seeing cases settled much quicker because of the body camera[s]." Brandt Williams, "Minneapolis police chief says body cameras are already paying off," *Minneapolis Public Radio*, July 19, 2016, <https://www.mprnews.org/story/2016/07/19/minneapolis-police-body-cameras-benefits>. Minneapolis Police Chief Janeé is quoted as saying "What was great about that is, not only could you see the individual captured on video, but prosecution and charging happened rather quickly ... The evidence was right there captured on that body camera."

Police Conduct Review (OPCR), suggested that a decrease in “language and attitude complaints” against Minneapolis police officers between 2016 and 2017 ““may be due to body cameras.””<sup>677</sup> On April 19, 2017, nine months after BWCs were implemented by the Minneapolis Police Department, Jaafar told the Minneapolis City Council that although it can be difficult to fully measure the impact of BWCs on complaints, there were many instances in which officers and citizens used more courteous language when they knew they were being recorded.<sup>678</sup> Jaafar also told the Minneapolis City Council that Chief Janeé Harteau had used the footage in issuing discipline against officers facing credible allegations of misconduct.<sup>679</sup> Ultimately, law enforcement officials maintain that under SF 498, BWCs can still have several benefits and are “mutually beneficial” to law enforcement and the public, making “investment in the technology ... well worth it.”<sup>680</sup>

Government transparency advocates and representatives of the black community were more cautious regarding the potential of BWCs, saying they are not a “quick fix” as some people thought they would be, but that the technology can still be beneficial if combined with “better training [of] police officers [and] better community relations.”<sup>681</sup> Mgeni argued that BWCs can be “mutually beneficial,” but only if arguments by the police and the public are both taken into account.<sup>682</sup> For example, he suggests that BWC footage can not only provide accountability for police, but also for the public, protecting

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<sup>677</sup> Williams, “Mpls: police cams had impact on complaint process last year.”

<sup>678</sup> Ibid.

<sup>679</sup> Ibid.

<sup>680</sup> Paul Schnell (Chief of Police for the Maplewood, Minnesota Police Department) in discussion with the author, March 2017; Andy Skoogman (Executive Director of the Minnesota Chiefs of Police Association) in discussion with the author, March 2017.

<sup>681</sup> Matt Ehling (member of MCCOGI) in discussion with the author, February 2017.

<sup>682</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Yusef Mgeni, 1<sup>st</sup> Vice-President, NAACP)



officers from false accusations or complaints.<sup>683</sup> Thus, all three parties involved in the lobbying and reaction to SF 498 indicate that there is still potential for BWCs to help solve some of the problems they are meant to address, as an instrument of truth and a means of accountability.

Finally, the case study falls under the theoretical framework of the paper. In order for BWCs to be part of the solution, perceived benefits of the technology must be balanced with possible limitations or harms. SF 498 is an example in which calls for accountability were outweighed by concerns related to privacy, leaning heavily in favor of law enforcement. This led to a law that makes the majority of BWC footage private, despite the supposed “presumption that government data are public” under the MGDPA.<sup>684</sup> The ACLU and PCOC recommendations below suggest several alternative means to achieve this balancing in which it is more likely to be beneficial to all parties. The recommendations will demonstrate how the ideal functions of BWCs as a means of accountability can be more fully maintained, while concerns related to privacy and other issues raised by law enforcement are still mitigated.

### **ACLU & PCOC Recommendations**

Both the ACLU and the Minnesota PCOC recommended specific disclosure policies that would protect the public interest of access to the footage while being careful not to exacerbate privacy concerns and other issues raised by law enforcement. The ACLU calls public disclosure of these government records “a tricky issue pitting two

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<sup>683</sup> Minn. H., Hearing on S.F. 498 before the H. Comm. on Civil Law and Data Practices Policy, 89<sup>th</sup> Minn. Leg., Reg. Sess. (May 10, 2016), available at <https://www.youtube.com/watch?v=ZlclOkWiOV0> (statement of Yusef Mgeni, 1<sup>st</sup> Vice-President, NAACP); Vezner, “Dayton signs law governing police body cameras and footage.” State Rep. Brian Johnson also discussed false accusations and is quoted as saying, “The problem is we’ve gotten into a world of lawsuits ... We’ve had some great officers that’ve had their careers destroyed because of false accusations, and departments just get rid of the lawsuit, because it’s cheaper than fighting it.”

<sup>684</sup> Minn. Stat. § 13.01(3).; Gemberling and Weissman, “Data Privacy,” 580.

important values against each other: the need for government oversight and openness, and privacy,” and suggests policies in which “[t]hose values [are] carefully balanced by policymakers.”<sup>685</sup> The ACLU recommends disclosure if subjects of the footage consent.<sup>686</sup> Further, anyone recorded by the cameras, or criminal defense attorney’s representing subjects of the video, should have access to the footage and be allowed to make copies.<sup>687</sup> Additionally, footage should be redacted when possible, including blurring out portions of the audio or video if they would identify any subjects or other private information.<sup>688</sup> Any unredacted or unflagged recordings should not be made public unless the subjects consent.<sup>689</sup> At the time of the PCOC report, BWC footage was a matter of public record, which the PCOC supported.<sup>690</sup> As a result, the organization opposed the decision by lawmakers to largely make BWC footage private.<sup>691</sup>

Combined with the recommendations discussed earlier promoting accountability and mitigating the concerns of reliability/accuracy, privacy, and costs, these ACLU and PCOC recommendations regarding access to footage balance the ideals of BWCs while also weighing concerns. This balancing suggests that BWCs, while not a panacea, can be beneficial to all stakeholders with policies that consider arguments from all parties involved. SF 498 is a case study of a law in which the lawmakers attempted to do this balancing, but weighed the harm of privacy concerns too heavily over the ideals of truth and accountability.

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<sup>685</sup> Stanley, “Police Body-Mounted Cameras: With Right Policies In Place, A Win For All,” 7-8.

<sup>686</sup> Ibid.

<sup>687</sup> Ibid.

<sup>688</sup> Ibid.

<sup>689</sup> Ibid.

<sup>690</sup> “Body Camera Implementation Research and Study,” 27.

<sup>691</sup> Michelle Gross, “4/6/2016 Newsletter,” *Communities United Against Police Brutality*, April 6, 2016, [http://www.cuapb.org/4\\_6\\_2016\\_newsletter](http://www.cuapb.org/4_6_2016_newsletter).

## *Chapter 7: Conclusion*

The 2014 shooting of Michael Brown and subsequent deaths of black men at the hands of law enforcement have contributed to calls for the use of BWCs as a means of finding the truth and being a means of greater police accountability. Although these events have led to increased national attention on BWCs, they are far from the first instances of division and distrust between the black community and law enforcement. It is a conflict deeply rooted in the history of the United States that has evolved and transformed over several generations, tracing back to the Thirteenth Amendment, the forced labor system known as “peonage,” and white American’s growing fear of black criminality, manifesting in lynching, mass incarceration, and police brutality. Thus, this paper first suggested that BWCs are meant to be a solution to a problem that is far more difficult and complicated than it appears on the surface, going beyond the recent cases of unarmed black men who died at the hands of law enforcement.

Second, this paper proposed a theoretical framework necessitating the balancing of perceived benefits of BWCs with potential limitations or harms. Although the use of BWCs is driven by the ideals of truth and accountability, it also raises concerns related to reliability, privacy, and costs. Additionally, perceived benefits are weighed with potential concerns when determining access to BWC footage. Thus, this paper provided a framework and analysis so “we the public [can] completely understand what’s at stake” and suggested “a balance [that needs] to be struck.”<sup>692</sup> In so doing, this paper also demonstrated the deep complexity of the BWC debate and the technology itself.

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<sup>692</sup> “Minnesota: Balancing freedom and security in our age of technology,” *Pioneer Press*, Oct. 25, 2015, <http://www.twincities.com/2015/03/13/minnesota-balancing-freedom-and-security-in-our-age-of-technology/>.

Finally, this paper also discussed several policies recommended by the ACLU and the Minneapolis PCOC, including 1) the necessity of maintaining the goal of accountability and transparency, 2) policies addressing the concerns of reliability/accuracy, privacy, and costs, and 3) policies to balance public access to footage against potential harms from such access. Although these recommendations do not completely solve the concerns related to BWCs, they do help alleviate them. As a result, the balancing of perceived benefits with potential limitations called for by this paper's theoretical framework is possible with the right policies in place.

Certainly, BWCs are not a panacea. They are a complicated and controversial technology that is meant to address societal problems that have existed for hundreds of years. However, this paper suggested that BWCs can still be part of the solution to the societal problems they are meant to address, if lawmakers and policymakers conduct the necessary balancing of benefits and limitations. This paper demonstrated several ways in which BWCs are already proving to be beneficial, from a drop in complaints in Memphis and Minneapolis to being used as a training tool in Greenville, North Carolina to building trust between law enforcement and the public in Muskogee, Oklahoma, and more. BWCs do not have to be a “replacement” for dash cameras and other existing technology, but rather can and should be a “supplement.”<sup>693</sup>

The debate over body cameras will certainly continue to be an evolving issue, necessitating the next step of research doing a cost-benefit analysis to ensure the cameras are accomplishing what they are meant to and not harming the public ways that must be avoided. However, we can conclude that with the right policies in place, BWCs can play a significant role in righting some of the wrongs in our society, both past and present.

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<sup>693</sup> “Body Camera Implementation Research and Study,” 8-11.

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